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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF RHODE ISLAND.

BY
SAMUEL AMES,
CHIEF JUSTICE AND REPORTER.

VOLUME III.

RHODE ISLAND REPORTS.

VOL. VI.

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JUDGES
OF THE
SUPREME COURT

DURING THE TIME OF THESE REPORTS.

HON. SAMUEL AMES, CHIEF JUSTICE.
HON. GEORGE A. BRAYTON,
HON. ALFRED BOSWORTH,
HON. SYLVESTER G. SHEARMAN, } **JUSTICES.**

ATTORNEY-GENERAL.

JEROME B. KIMBALL, Esq.
WALTER S. BURGESS, Esq.
(Sworn in, May 30, 1860.)

ERRATUM.

On page 467, 2d line from the bottom, for "publication" read "prohibition."

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
FOR THE
COUNTY OF PROVIDENCE, MARCH TERM, 1859,
AT PROVIDENCE.

PRESENT:

HON. SAMUEL AMES, CHIEF JUSTICE.
HON. GEORGE A. BRAYTON, } JUSTICES.
HON. ALFRED BOSWORTH, }

TRUMAN BECKWITH v. GEORGE A. HOWARD.

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In construing a covenant in a lease by indenture, the words of the covenant are to be taken, however set down in the instrument, as the words of the party to whom they properly belong, or if properly belonging to both, as the words of both; the words of an indenture being the words of either party, and not to be taken most strongly against the one or beneficially for the other, as the words of a deed-poll are.

Under this rule, where in the clause of demise in the lease, following a description of the lot leased as bounded on either side by a gangway, is thrown in this sentence, "the said gangways are to be kept open for the benefit of the lot hereby leased, and also of the lots hereunto adjoining;" *held*, that this was a covenant of the lessee as well as of the lessor.

A court of equity will, at the suit of a joint owner of the reversion of premises leased for a term of ninety-five years, upon final hearing, perpetually enjoin the lessee, who has purchased in four fifths of the reversion, from building upon, or over, or closing up, or encumbering, contrary to a stipulation in the lease, a private gangway laid out between,

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and for the benefit of the demised premises and an estate adjoining owned by the lessee; and this, without regard to the use or value for use of the gangway, or to the comparative advantage to the plaintiff and disadvantage to the defendant, consequent upon the injunction.

BILL IN EQUITY by the plaintiff, a joint owner with the defendant of the reversion of the Howard Block estate, so called, situated on the north side of Westminster Street, Providence, to restrain the defendant, also tenant of the same under a lease for ninety-five years, from building upon and closing up a gangway at the east end of said estate, contrary to the provisions of the lease.

The case was heard upon bill and answer; and from these it appeared, that by a sealed agreement, entered into in 1786, by Nathan Waterman, the then owner of the estate, and Archibald Stewart, the then owner of the estate adjoining it on the east, since called the Museum estate, a twenty foot gangway, running from Westminster Street to the channel of the Cove, was laid out between the two estates; thirteen feet of the width of which was taken from the land of Waterman, and seven feet from the land of Stewart; and that by said covenant it was agreed, that the gangway should remain "free and open, for the common use and benefit of them (the parties) and each of them, their respective heirs and assigns forever; and also for the equal and common use of Elisha Waterman, Rufus Waterman, and Richard Waterman, brothers of the said Nathan Waterman, their respective heirs and assigns forever;" the said brothers Waterman then owning a large real estate in that vicinity; that though the above agreement was not recorded until November 1, 1853, the gangway was actually laid out at or about the time of its date, and has been kept open ever since, though now but little used, and of no value, as a gangway, having become a nuisance to the neighborhood, from the accumulation of filth in it. Upon the death of Nathan Waterman in 1832, intestate and without issue, and the division of his estate amongst his said brothers and heirs at law, his Howard Block estate became vested in his brother, Richard Waterman, who, on the first day of January, 1847, leased the same for the term of ninety-five years to the respondent. This

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lease, which was by indenture, and executed by both parties, witnessed : " That the said Richard Waterman, for and in consideration of the rents and covenants hereinafter named and contained, on the part of the said George A. Howard, his executors, administrators, or assigns, to be paid, kept, and performed, hath demised, leased, and to farm let, and by these presents doth demise, lease, and to farm let, unto him the said George A. Howard, his executors, administrators, and assigns, a lot of land, situate on the northerly side of Westminster Street, on the west side of the bridge in said city of Providence, and bounded, southerly, on said Westminster Street, sixty-four feet and six inches ; westerly, on a gangway eleven feet in width, and extending on said gangway from said Westminster Street, about two hundred feet to Fulton Street ; northerly, on said street about sixty-four feet and six inches ; and, easterly, on a gangway about two hundred feet ; *the said gangways are to be kept open for the benefit of the lot hereby leased, and also of the lots hereunto adjoining* ; together with two shares, or rights, in the Rawson Fountain Society ; the lot hereby leased is the lot next west of the ' Stewart Gangway,' so called. To have and to hold," &c. The lease then went on to provide, by express mutual covenants, for an appraisement of the rent at the end of fifteen years, and at the end of every five years thereafter during the term ; for the payment of taxes and assessments by the tenant ; that the buildings and improvements put and being upon the premises should be pledged as security for the annual rent ; that in case of rent in arrear six months, and after demand thereof, the lessor, his heirs and assigns should have the right to reënter and terminate the lease, in which case, as well as at the end of the term by lapse of time, the buildings and improvements then upon the premises should be conveyed to, and purchased by the lessor, his heirs and assigns, at their appraised value ; and the lease concluded with an express covenant on the part of the lessee to pay rents and taxes, and at the termination of the lease peaceably to surrender possession of the demised premises. Upon the death of Richard Waterman, shortly after the above lease was entered into, his two sons, Stephen and Caleb, and the children of a deceased son, Nathan,

as representatives of their father, took, by devise, his real property, including the Howard Block estate, as tenants in common; and upon a probate division of the same amongst them, made in 1848, the reversion of the Howard Block estate became vested in Stephen and Caleb. The petition for the division, signed by all interested, described this estate as "one lot of land, in the said city of Providence, on the north side of Westminster Street, adjoining the same, and measuring sixty-four feet and one half foot on said street, and running back two hundred feet to Fulton Street, and leased to George A. Howard, *with right in the gangways adjoining*." By mesne conveyances from the devisees and representatives of the devisees of Richard Waterman, the complainant was, at the filing of the bill, the owner of one fifth, and the respondent, of four fifths, of the reversion of the Howard Block estate, to come into possession of the former upon the determination of the above lease for ninety-five years to the latter. The deeds of this reversion, executed to the respondent, recognized the gangway on the east of the estate. The Museum, or Stewart estate, lying directly east of the gangway in question, and the right in the gangway, were purchased by the late Gamaliel L. Dwight, Esq., in April, 1851; his deeds having been recorded on the 22d day of April of that year; and was by Dwight, on the 18th day of January, 1854, conveyed for value to the respondent, by deed of that date, recorded on the 23d day of January, 1854; since which it has remained the sole property of the respondent.

The buildings on both these adjoining estates, the Waterman or Howard Block estate, leased to the respondent, and the Stewart or Museum estate, owned by him, having, in November, 1858, been destroyed by fire, the respondent proposed to build a continuous building, covering the front of both estates on Westminster Street, and thus to close up the twenty foot gangway, laid out and existing as aforesaid between them. It was to enjoin this closing up of the gangway by the respondent, as contrary to the stipulation of his lease of the former estate, that this bill was filed by the complainant as entitled to one fifth of the reversion thereof.

T. A. Jenckes, for the complainant, contended, that the agree-

ment of 1786, laying out the gangway, if known to the respondent, was binding upon him, though not recorded until after his lease, and after the conveyance of the Stewart or Museum estate to his grantor, Dwight, or by Dwight to him. The open gangway was notice sufficient to him; and if not, his title-deeds, as reversioner of four fifths of the Waterman or Howard Block estate, as well as his title-deeds, as owner of the Stewart or Museum estate, bounded him upon, and apprised him of, the gangway, and the right to the gangway.

He also insisted, that his lease of the Howard Block estate expressly required him to keep open the gangway for the benefit, not only of the lot demised, but of the adjoining lots; that it was of no consequence why the gangway was required to be kept open, if the lease did require it. He suggested, however, that upon determination of the lease by reëntry for non-payment of rent, or upon its expiration, the lessor and his heirs and assigns were bound to purchase the buildings at an appraisal, and were therefore interested in having them built according to the requirements of the lease, with all the means of access preserved which the lease stipulated for; and that upon partition of the estate, especially, the gangway might be of the last importance to one or more of the part-owners, for the purpose of access to his or their part.

James Tillinghast, with whom was *Bradley*, for the respondent:—

The lease contains no covenant on the part of the lessee to keep open the gangways; no reservation of them by the lessor; the words referred to as such, being mere words descriptive of their character as existing for the benefit of the leased and the adjoining estates, and implying a stipulation on the part of the lessor, that he would not, during the term, close them up. The express mutual covenants which follow, in the lease, and the express covenant of the lessor, with which it closes, support this construction.

By the terms of the lease, the gangways are to be kept open for the benefit of the lot leased, and of the lots adjoining thereto; meaning, that they are to be kept open,—the gangway, twenty feet wide, on the east of the Howard Block lot, for the benefit

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of that lot and the Stewart or Museum lot, and the gangway eleven feet wide, on the west of the Howard Block lot, for the benefit of that lot and the lot west of it. As owner of the Stewart or Museum lot, and as lessee for ninety-five years of the Howard Block lot, the respondent is alone interested in that gangway, and may, therefore, close it up.

As to the agreement of 1786, no claim is set up in the bill, except under Nathan Waterman and Richard Waterman; and as that agreement was not recorded until after the lease and after the deed of the Stewart estate to Dwight, the grantor of that estate to the respondent, the agreement cannot bind the latter.

The gangway is not only useless, but a nuisance; and a court of equity will not, on account of a stipulation in a lease made for the benefit of two estates, of one of which the defendant is the absolute owner, and of the other of which he is the lessee for ninety-five years, enjoin him from a valuable improvement, which can possibly harm no one. If the closing of this gangway by buildings affects the property injuriously, the lessor will be compensated in their lesser value upon appraisal, at the determination of the lease. The injury, at all events, may be compensated in money, and a court of equity will not, in such a case, enjoin; or where the injury is not in the nature of irreparable mischief, or, at least, a serious injury. *Collins v. Plumb*, 16 Ves. 454; *Atkins v. Chilson*, 7 Met. 398; *Dana v. Valentine*, 5 Ib. 8, and cases cited; *Ingraham v. Dunnell*, Ib. 118. In *Dickenson v. Grand Junction Canal Co.* 19 Eng. L. & Eq. R. 292, and in *Steward v. Winters*, 4 Sandf. Ch. R. 587, the injury was, in fact, serious. In short, the court exercises, in such cases, an equitable discretion; and will refuse to enjoin, or dissolve an injunction granted, upon the ground that the complainant has acquiesced in what he complains of. *Wood v. Sutcliffe*, 8 Eng. L. & Eq. R. 217; *Barret v. Blagrove*, 5 Ves. 555; S. C. 6 Ib. 103.

By the opening of Dorrance Street, at the west end of the leased premises, affording a fine access to it, not contemplated at the time the lease was given, things have so changed, that the court should act upon the presumption, that had the change

in question been anticipated, the clause in question would have been modified, or would not have been inserted.

If the court feel bound to enjoin at all, they will, at least, define what is a "keeping open" of this gangway for the benefit of this and the adjoining estates; and say, whether the respondent may not be permitted to arch it over with his building, with flights of steps from its sides to the story above, leaving a sufficient space for passage, and providing for light.

AMES, C. J. This is a bill, filed to enjoin a tenant from building upon and closing up a gangway, part of the demised premises, or, in which he has a right as appurtenant to them, as an act forbidden by a stipulation in his lease; and is in the nature of a bill for the specific performance of a contract. *Barrett v. Blgrave*, 5 Ves. 555.

The lease is by indenture, purporting to be the deed of, and actually executed by, both parties; and, after describing the lot leased as bounded on the west, by a gangway eleven feet wide, and on the east, by the gangway in question, there is thrown in, at the end of the description, this sentence: "*the said gangways are to be kept open, for the benefit of the lot hereby leased, and also of the lots hereunto adjoining;*" after which the description of what is demised proceeds, "*together with two rights or shares in the Rawson Fountain Society; the lot hereby leased is the lot next west of the 'Stewart Gangway,' so called,*" another reference to this gangway. Now it is said, that, in this, there is no covenant on the part of the lessee to keep the gangways open, or reservation of the right to have them kept open on the part of the lessor, but a simple description of the lot as bounded by gangways, and, the language being wholly that of the lessor, a stipulation on *his* part that he will not close them. We cannot agree to this construction as the natural one, or that accordant with the probable intent of the parties. The gangways were, in fact, laid out for the benefit of the adjoining estates as well as of the estate leased; and this gangway, the lease says, was called "*the Stewart gangway,*" after, it would seem, the estate adjoining it on the east, the uses of which it served, equally with those of the lot demised. In the midst of the description of what was leased, we find this positive declara-

tion, looking to the future, inserted, as a clause by itself: "the said gangways are *to be* kept open for the benefit of the lot hereby leased, and also of the lots adjoining." As the lessor was about to part with his estate for a long term to the lessee, and, in respect to these gangways, was under an obligation, to adjoining proprietors, to keep them open, the most natural construction would seem to be, that it was his purpose to impose this obligation upon the lessee as well as to recognize it as his own. At the time of the execution of this lease, the Stewart estate was in a separate ownership and occupation; and Dorrance Street not having been laid out, this wide gangway afforded the only convenient access to the east side and rear of the demised premises. There was nothing, then, in the circumstances which would lead us to suppose, that, for the benefit of the lot leased to him, as well as in fulfilment of what was due to adjoining proprietors, the lessee should demur to enter into this stipulation as his own; and we deem this clause to have been designed to be obligatory upon both parties, and that consequently it is to be construed as the language of both. "And the words of an indenture are the words of either party. And albeit they be spoken as the words of the one party only, yet they are not his words alone, but may be applied to the other party if they doe more properly belong to him; for every word that is doubtful shall be applied and expounded to be spoken by him to whom they will best agree according to the intent of the parties; and they shall not be taken most strongly against one, or beneficially for the other, as the words of a deed-poll shall." Sheppard's Touchstone, 52.

But it is argued, that granting this to be the covenant of the defendant, it is so qualified that it cannot be the basis of an injunction; and the case of *Collins v. Plumb*, 16 Ves. 454, is cited as a parallel case. That was the case of a covenant annexed to the grant of a well, "not to sell or dispose of water, to any person or persons whomsoever, to the injury of the proprietors of certain waterworks, their heirs, executors, administrators, or assigns," who were the grantors of the well. Lord Eldon would not enjoin the breach of this covenant, because the injunction would be of no value to the plaintiffs, since, upon

every application to commit for a breach of it a trial must be directed to ascertain whether a particular act of sale, which the covenant implied might be without injury to the plaintiffs, would in fact be injurious to them; the purpose of an injunction being to save further litigation. But we cannot see how the positive affirmation of the covenant in the case before us, that, "the said gangways are to be kept open," is qualified by the statement of the purpose of keeping them open; to wit, "for the benefit of the lot hereby leased, and also of the lots hereunto adjoining." Such an avowal of the purpose of a positive covenant constitutes the purpose neither a condition nor limitation of the covenant; but simply declares the motive or inducement of the parties to enter into it. The motive may have been a wise or foolish one,—it may exist or have ceased to exist,—yet the covenant, if it be lawful, remain unaffected. To assimilate this covenant to that in *Collins v. Plumb*, we must construe it to be limited by the fact of benefit, as that was limited by the fact of injury. We must confound an inducement to enter into an agreement with a plain qualification of its terms; the keeping open of a gangway, which implies continuity, with the selling of water, which supposes many distinct acts, each, according to its character, having a different effect.

Taking this covenant, then, to keep the gangways open, to be the unqualified covenant of the defendant, the court is asked by this bill to restrain him from closing one of them up by his projected building, and, by such restraint, to compel him, literally, to perform his covenant.

The principles which regulate the exercise of the jurisdiction in this and the like cases are explained by Lord Cottingham, in *Dietrichsen v. Cabburn*, 2 Phillips, 52, S. C. 2 Cooper, time of Cottenham, 72, and illustrated by numerous authorities. The jurisdiction to restrain by injunction an act from which the defendant, by contract or duty, is bound to abstain, is not confined to cases in which the court has jurisdiction over the acts of the plaintiff. If the bill state a right or title in the plaintiff to the benefit of the negative agreement of the defendant, or to his abstaining from the contemplated act, it is not material whether

the right be at law, or under an agreement which cannot be otherwise brought within the jurisdiction of the court. As in patents, copyrights, services to mills, and the like, the complainant may demand the interposition of the court for the protection of his ascertained legal right. *Ib.*

The right of the plaintiff, as joint owner with the respondent of the reversion of the demised premises, to insist, that the latter shall not, in the use of them as lessee, violate an express stipulation of the lease, is clear; for although the tenant has become the owner of four fifths of the reversion, he is estopped by the lease, under which he was let into and now holds possession, from denying the title of his landlord, so far as represented by the plaintiff, or from claiming, as to him, any rights in the thing demised at war with the provisions of his lease. As long as his title to possess the whole premises embraced in the original contract of letting rests upon that contract, his relation and obligations as tenant are to be judged and measured by it, and remain in full force, notwithstanding his interest in the reversion.

The act or obstruction of right threatened, being, too, of a permanent or continuing character, the case would seem to be, so far as that goes, a very fit one for the action of the court. Indeed, upon principle, the strongest case for the interposition of the court to prevent a clear breach of contract as to the use of property, is one, in which the owner, as landlord, licensor, principal, or client, had entrusted the respondent, as his tenant, licensee, agent, or attorney, with the custody of, or power over it, by the very contract attempted to be violated. These are fiduciary relations, so far as the subject of them is concerned; and, in a court of equity, the strictest good faith in the observance of the duties required by them is properly compelled. *Dietrichsen v. Cabburn*, *Barret v. Blagrove*, *supra*; *Lord Grey De Wilton v. Saxon*, 6 Ves. 106; *Cholmondeley v. Clinton*, 19 *Ib.* 261; *Macker v. The Foundling Hospital*, 1 V. & B. 188; *Rankin v. Huskisson*, 4 Sim. 13; S. C. 6 Eng. Cond. Ch. R. 14; *Squire v. Campbell*, 1 M. & C. 459; S. C. 13 Eng. Cond. Ch. R. 468; *Youatt v. Winyard*, 1 Jac. & Walk. 394; *Green & others v. Folgham & others*, 1 Sim. & Stu. 398; S. C. 1 Eng. Cond. Ch. R.

398; *Morrison v. Moat*, 6 Eng. L. & Eq. R. 14; 9 Ib. 182; *Hills v. Miller*, 3 Paige, 254; *Barrow v. Richard*, 8 Ib. 351; *Steward v. Winters*, 4 Sandf. Ch. R. 587.

Two main objections are raised by the respondent to the injunction applied for in this case. The first is, that this gangway, if not laid out, was recognized by the lease as existing solely for the benefit of the Waterman or Howard Block estate, and the Stewart or Museum estate, between which estates it lies; and that, as he has become the owner in fee of the latter estate, and is the lessee for the long term of ninety-five years from the 1st day of January, 1847, of the former estate, he has, as the legal owner of both, a right to dispense with the stipulation in question, and to improve both, during his term, in the manner most advantageous to himself.

It is difficult to see how his title to the Stewart estate can enable him to dispense with a stipulation made by him as lessee of the Waterman estate; it is still more difficult to see how his title *under* the lease can enable him to close up a gangway which, for the benefit of the leased premises, as well as of the adjoining estates, he agreed, in the lease, to keep open during his whole term. The lease looks through the term, and, as between him and his landlord, restricts his rights as tenant in this very particular; and these might as well be urged as enabling him to dispense with any other stipulation of the lease as the one we are considering.

Nor can we speculate upon the question, as to the manner in which the parties, for their mutual interests, would have contracted, had they foreseen the changes which have since taken place in that neighborhood, any more, than whether they would have contracted at all; or hold, that either is discharged from the obligation of his contract in consequence of those changes. All contracts, looking through long tracts of time, are necessarily made with the knowledge that before they expire changes must occur; and so that the subject itself remains, the chances and changes of things have never been understood, either at law or equity, to dispense with, or even to modify, the construction of an express stipulation, unless provision be made in it to that effect. If the parties have agreed, that *for the benefit* of the

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leased and adjoining estates, this gangway shall be kept open, we have no right, from subsequent occurrences, to be wiser than they were, or to revise their judgment, thus embodied and made binding upon all. The maxim of "*cessante ratione*," &c., referred to at the argument, when applicable at all, is applicable to rules of law, and not to contracts. The *parties* alone are competent, by a new agreement, to accommodate an old one to new circumstances, so as better to carry out their original purpose. If the court were to do it, it would make a contract for them.

The other objection is, that inasmuch as the gangway, though hitherto kept open, is, since the opening of Dorrance Street, but little used, and is of no value,—but on the contrary, from the accumulation of filth in it has become a nuisance in the neighborhood,—a court of equity ought not, according to its rules, to interpose to prevent the respondent from reaping a great advantage from his proposed improvement of his estates by building upon and closing it up, his agreement notwithstanding, when little or no harm can come to the plaintiff from so doing.

We do not feel at liberty, when properly invoked to prevent the violation of such a covenant, to grant or refuse our interposition according to the comparative advantages which may accrue to the one party, or evils which may fall upon the other, from such violation. The contract concludes, and shuts out, all such considerations. The proprietor of an estate has a right to dictate, so that they be lawful, the terms upon which he will permit another to possess and enjoy it; and it will hardly do, in a court of conscience, for the party who accedes to them, and is thus, as tenant, let in to the property of another, to urge the convenience of dispensing with them as the reason for his being permitted to do so. The greatest advantages known to the law are those which come from the observance of good faith; the worst evils, from the want of it; and in comparison with these, as in honor and in morals, all others fade into comparative insignificance.

This, as it might be supposed, is the settled doctrine of a court of equity in relation to the exercise of its injunctive process to prevent the violation of such a covenant in a lease, or a breach

of contract, or abuse of confidence or trust, in analogous cases. The nature and degree of the mischief,—the comparative advantage of its interference to the plaintiff and disadvantage to the defendant,—is regarded by the court as a reason for its action or inaction only in relation to torts; and then, except in cases of fugitive trespass only, upon a motion for a preliminary injunction, pending the controversy concerning the right. *Sprague v. Rhodes*, 4 R. I. Rep. 302. It is true, as shown by the cases of *Barret v. Blgrave*, 5 Ves. 556, and *Wood v. Sutcliffe*, 8 Eng L. & Eq. R. 217, S. C. 2 Simon, N. S. 163, quoted for the respondent, and as might be shown by numerous others, if the plaintiff, by acquiescence in a tort, has invited the defendant to outlay upon the faith of such acquiescence, or has by such conduct equitably waived the benefit of a contract to which he was entitled, he is as entirely debarred from receiving the aid of the court for his protection, as if he had released either under his hand and seal. In this case there has been, however, not only no such acquiescence, but no acquiescence whatever. The gangway is still open; and the plaintiff has applied, upon the mere threat of the defendant to close it up, indicated by the plan of his projected building, and his preparations for the foundation of the same. But the case of *Wood v. Sutcliffe*, supra, which was a bill to restrain the pollution of the mill-stream of the plaintiffs, is no authority for the position of the defendant, that upon the *final hearing* of a bill for protection against a continuing tort, a court of equity will refuse to enjoin it, merely because the mischief done or threatened is inconsiderable. That case was heard upon a motion for a preliminary injunction; and the remark of the vice-chancellor, in reply, that the mischief complained of was such as could be properly and adequately compensated by pecuniary damages, was based upon a fact which appeared upon the motion, that the plaintiffs had entered into an arrangement with other mill-owners, by which they were permitted to pollute the water of the stream at the rate of 2*l.* per horse-power of their steam-engines. "On the ground, therefore," says the vice-chancellor, Sir R. Kindersley, "that the plaintiffs themselves have shown that the injury they complain of is one which, in some

way, may be compensated by money, I think that I ought not to grant the injunction." S. C. 2 Sim. N. S. 169. The motion was in truth denied, so far as this ground went, because it appeared to have been made, merely "to apply to the defendants a certain pressure to bring them to terms also;" and because the vice-chancellor thought, as he said, that he "ought to leave the plaintiffs to that pressure which may be applied by means of an action or actions at law." *Ib.* In *Rochdale Canal Co. v. King*, 2 Sim. N. S. 78, the same vice-chancellor said, that but for the acquiescence of the plaintiffs, he would have enjoined the defendant before the final hearing, from using the water of their canal for purposes not warranted by law, upon the mere legal right, although they had recovered, in an action at law against the defendant for such unlawful use, only one shilling damages.

If the case of *Atkins v. Chilson*, 7 Met. 398, on this point mainly relied upon at the argument by the respondent, be understood to confound all distinctions between cases of tort and contract, and in the former class of cases, to limit relief to those cases only in which the mischief, though continuing, is irreparable or serious, it is at war with all the authorities before us, and numerous others. To examine a few.

In *Lord De Grey Wilton v. Saxon*, 6 Ves. 106, which was a motion for a preliminary injunction to restrain a tenant from breaking up meadow for the purpose of building, contrary to a covenant in his lease, Lord Eldon, in granting the motion, observed, "that he did so upon the ground of the covenant not to convert meadow; otherwise, he doubted whether it would do, upon the ground of waste, without an affidavit that it was *ancient* meadow." In *Macher v. The Foundling Hospital*, 1 V. & B. 188, his lordship expressly disclaimed the right of a court of equity to enter into a comparison, and to hold that a tenant, if licensed by acquiescence to carry on, contrary to the covenants of his lease, one trade on the leased premises, was thereby licensed to carry on other trades, as less offensive. In *Ran-kin v. Huskisson*, 4 Sim. 13, S. C. 6 Eng. Cond. Ch. R. 14, and in *Squire v. Campbell*, 1 M. & C. 459, S. C. 13 Eng. Cond. Ch. R. 468, which were bills filed by tenants of public lands under building leases, to enjoin the commissioners and officers in

charge of the lands, in the one case, from building, and in the other case, from erecting a statue near the sites leased, contrary to the agreements of letting, the decision, in the one case, and the discussion in the other, show, that the question was supposed to turn wholly upon the fact of violation of contract; the court holding, in the latter case, that the statue, which was of George the Third, was no nuisance, as it did not interfere with the carriage-way. In *Dickenson v. Grand Junction Canal Co.* 15 Beav. 260; S. C. 19 Eng. L. & Eq. R. 287, 293; in which it appeared, that a contract had been entered into between a canal company and mill-owners, sanctioned by an act of parliament, 58 Geo. 3, ch. 16, regulating the mode of using certain waters by which both were supplied, and that the company had used the waters in violation of the contract, they were, upon final hearing, perpetually enjoined from so using them. In delivering his judgment, the Master of the Rolls said: "If it be a contract duly entered into between the parties, it is no answer to a violation of it, to say, that it will not inflict injury upon one of the contracting parties. If the plaintiff have purchased from the company a right to preserve the waters of the rivers Bulbourne and Gade from being diverted in any other manner than as diverted at the passing of 58 Geo. 3, it is no answer to them to say, *that the diversion proved will not be injurious to them, or even to prove that it may be beneficial to them.* It is for them to judge whether the agreement shall be preserved, so far as they are concerned, in its integrity, or whether they shall permit it to be violated. It is, therefore, in my opinion, a matter of no moment in this case, that the plaintiffs have given no evidence of any actual diminution of water at their mills. Having established that the acts of the defendants are a violation of the contract entered into between them and the plaintiffs, and a violation of the act of parliament passed to carry it into effect, the plaintiffs are entitled to call upon this court to protect them in the enjoyment of that right which they have so purchased; and this court is bound to preserve it from being broken in upon." In *Steward v. Winters*, 4 Sandf. Ch. R. 587, a preliminary injunction had been granted to restrain the defendant from using as an auction-room, a store leased to him, "to be

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occupied for the regular dry goods jobbing business, *and for no other kind of business.*" Upon a motion to dissolve the injunction, because no irreparable or any injury, from the violation of the terms of the letting, had been proved, the vice-chancellor denied the motion, distinguishing the case from the case of a nuisance, "the owner or lessor having a right to insist upon such covenants as he pleases, touching the use and mode of enjoyment of the land." "He has a right, says he, to define the injury for himself; and the party contracting with him must abide by the definition."

The fact averred in the answer, that this gangway, from the filth accumulated in it, has become a nuisance in that neighborhood, does not help the defendant, or afford us a cause for permitting him to close it up. As he was in possession of the estates on both sides of it, it was his duty to keep it clean, or at least from becoming a public nuisance; and his neglect of so obvious a duty certainly does not entitle him to break his contract to keep it open. The abatement of such a nuisance may properly be left to the public authorities; and will consist, not in closing the gangway, but in compelling the defendant to keep it clean enough to preserve health, and to prevent noisome smells in the neighborhood.

We are asked by the respondent, even if we enjoin him, to determine what the keeping open of the gangway, in the sense of this stipulation in his lease, is; and, at least, so to modify our injunction as to permit him to overarch it with his building, and encumber its sides with flights of steps leading into the second story of his building; he taking care to provide it with sufficient light for the purpose of convenient passage through it. The phrase in the covenant, "the said gangways are to be *kept* open," necessarily refers to the manner and degree in which they were kept open at the time of the covenant. We understand by them that, in this respect, that state of things, which for the benefit of the estate of the lessor and in fulfilment of his obligations to the proprietors of adjacent estates had so long existed as the measure of the rights of all, is to continue during the term of the lease; and our injunction must be to that effect.

In conclusion, it is highly probable that it will be greatly

advantageous to the defendant, and but little injurious to the plaintiff, that the new block projected by the former should extend continuously along the Westminster front of his leasehold and freehold estates, and thus close up this gangway. It is, however, the plaintiff's right and the defendant's covenant that it should be kept open; and although it may seem to us a fit case for an arrangement, we are compelled, both by principle and authority, upon the demand of the plaintiff, to protect him in what is thus secured by law.

Let a decree be entered perpetually enjoining the defendant from building upon or over, closing up, or otherwise obstructing passage into, through, or along the gangway in the pleadings mentioned.

Petition of S. AUGUSTUS ARNOLD & others in the Matter of
DARIUS SESSIONS.

Upon the filing of a petition by creditors of an insolvent for the appointment of a new assignee of his assets, in the place of the original assignee, deceased, notice of the pendency of the petition must be given by the clerk to the creditors of the insolvent, by advertisement for three weeks, before the court will act, in analogy to the notice required by statute upon an original petition for the benefit of the insolvent act.

PETITION of creditors of Darius Sessions, an insolvent, to whom, at the September term of this court, 1851, had been granted the benefit of the "act for the relief of insolvent debtors," for the appointment of a new assignee in the place of Sylvester Hartshorn, deceased, originally appointed assignee upon the granting of the insolvent's petition.

Randolph, for the petitioner.

THE COURT ordered the clerk to give notice of the pendency of the petition, by advertisement for three weeks next before their acting upon it, in analogy to the statute notice required upon the filing of an original petition for the benefit of the insolvent act; the appointment of an assignee being incidental to the granting of such a petition.

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In the Matter of WILLIAM A. JENCKES & another.

Magistrates empowered to take depositions in Rhode Island, may, by force of ch. 187, sects. 15 and 21, of the Revised Statutes, compel, by attachment for contempt, witnesses, duly summoned by them, to appear before them and depose as to what they know relative to any civil suit or action pending in this or any other state or government.

The application of a poor debtor before a master in chancery in Massachusetts, to be admitted to the poor debtor's oath, under ch. 141 of the Supplement to the Revised Statutes of Massachusetts, is a civil suit, in the sense of the deposition act of Rhode Island, notwithstanding his creditors have filed charges of fraud against him before the master in chancery; and a Rhode Island magistrate may compel witnesses to give their depositions here, to be used against the debtor in Massachusetts, upon such an application.

APPLICATION for a writ of *habeas corpus*, setting forth that the applicants were in the custody of an officer under a writ of attachment issued against them by Horatio A. Rogers, Esq., a justice of the peace in the city of Providence, for contempt, and praying that they be relieved from said restraint, as unauthorized and illegal.

At the hearing of the application, it appeared, that the applicants were duly summoned to appear before said justice, at his office, on the third day of May, 1859, at 10 o'clock, A. M., to depose as to what they knew relative to the application of William H. Jenckes of Cumberland to take the poor debtor's oath, then pending before Henry C. Rice, Esq., a master in chancery within and for the county of Worcester, in the commonwealth of Massachusetts, wherein Charles W. Freeland & Co. of said Worcester were creditors and respondents; that said creditors had filed before said master charges of fraud against their debtor, the said Jenckes, under the provisions of chapter 141 of the Supplement to the Revised Statutes of Massachusetts, and that said application and charges were pending before said master; and that, denying the authority of the magistrate, Rogers, to compel them to give their depositions to be used in such a proceeding in Massachusetts, they had neglected and refused to appear before him to depose, as in his summons required. The magistrate, thereupon, issued a writ of attachment against them to bring them before him, to depose as aforesaid; and whilst in custody under this writ, and before being brought

before the magistrate, they made their application to this court for relief, by a writ of *habeas corpus*.

Robinson, for applicants:—

The magistrate has jurisdiction to summon the applicants, and to take their depositions, only by virtue of ch. 187, sect. 15, of the Revised Statutes; that is, only where the depositions are to be used “in the trial of any *civil suit* or *action*.” This proceeding in Massachusetts is neither a “suit” nor “an action,” in the sense of the statute; as may be seen by comparing this section with section 7 of the same chapter, which gives a summons to witnesses, and uses the words “suit or *proceeding*, civil or criminal,” as words of larger signification. Indeed, all the sections of this chapter, from sect. 16 to sect. 26, inclusive, indicate that the depositions contemplated to be taken under it are to be taken for use in “*courts* ;” and not in mere proceedings before magistrates in this state, or elsewhere.

But further, this proceeding in Massachusetts, though upon the filing of charges of fraud declared to be in the nature of a suit at law, to which the debtor is to plead guilty or not guilty, is, after such charges are filed, a *criminal* suit, upon conviction under which the debtor may be sentenced to confinement at hard labor in the house of correction for a term not exceeding one year, or in the county jail for a term not exceeding six months. Supplement to Rev. Stats. of Mass. ch. 141, §§ 11–15. *Chamberlain v. Hoogs*, 1 Gray, 172.

Brownell, against the application:—

An application by a poor debtor to be admitted to the oath, with creditors cited, is a suit between litigants—the debtor and his creditors; the accepted meaning of the word “suit” being extensive enough to embrace such a proceeding. *Weston v. City Council of Charleston*, 2 Pet. 449; Bouvier, Law Dict. tit. Suit.

But whether there was a suit pending, was matter for the magistrate to decide; and he having decided it, by issuing his citation and summons, his decision is conclusive. *Angell v. Robbins & others*, 4 R. I. Rep. 493. Neither can this court go into the question, whether this proceeding in Massachusetts is *quasi* criminal, for the same reason; and if criminal, no harm

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can come from compelling these applicants to depose, inasmuch as in such case the depositions cannot be used.

The proceeding, however, is a civil proceeding,—an application of a poor debtor to be relieved from imprisonment for debt,—and so far as action of the commissioner upon that application is concerned, remains such throughout, although the debtor, if convicted in the course of the ancillary proceeding for fraud, may be punished as a criminal. *Parker v. Page*, 4 Gray, 533, where see the case of *Chamberlain v. Hoogs*, 1 Gray, 172, considered and reviewed.

BRAYTON, J. The petitioners, in this application, ask to be relieved from imprisonment upon the writ of attachment, by virtue of which they are now held, on the ground that the magistrate who issued it had no lawful authority to issue such process; and they claim, that the magistrate has no authority to take the depositions which he proposes to take, or to summon the petitioners for that purpose; and that the whole proceeding is unauthorized by the statute.

The statute under which the magistrate proceeded to act, as contained in ch. 187, sect. 15, of the Revised Statutes, provides, that, "It shall be lawful for any justice of the supreme court, justice of the peace, or public notary, to take the deposition of any witness to be used in the trial of any civil suit or action," &c., "which may be commenced or pending in this state, or in any other state or government;" and by section 21 of the same chapter, it is provided, that any person may be compelled to appear and depose as aforesaid within this state in the same manner as to appear and testify in court.

The statute is express, that if there be a civil suit pending, the magistrate may summon any witness to appear before him to give his testimony relating to such suit; and if he refuse to attend, or having appeared, refuse to testify, the magistrate may exercise the usual power of a court of record, and attach the witness as for contempt of his authority, and commit him until he shall submit to an examination. And this he has authority to do, whether such suit be pending in the courts of this state, or in any other state or government. The statute was intended to extend that comity, which is properly due from

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one state to another, to every foreign jurisdiction ; and in all civil controversies, to enable such foreign state to administer justice, without let or hindrance here ; and by enabling the parties litigant to procure such testimony as may be necessary for the determination of the questions in issue between them, to prevent a failure of justice, which it is equally the interest of every civilized state should not occur. This power is conferred as ancillary to the court which has jurisdiction of the suit, and in aid of its proceedings. It is confined to civil suits, and does not extend to criminal proceeding ; criminal law being strictly local, and a subject to which the comity of states does not extend.

The power of the magistrate depends upon the fact that a civil suit was pending at the time at which the testimony of the witnesses was to be taken. If there were no such suit, clearly the magistrate had no power to summon. This is the condition upon which alone he has power to act at all.

It is not sufficient, as contended by the respondent, that the summons issued by the magistrate states that the testimony is to be used in a civil suit, and that such suit is pending, or that it be stated in the writ of attachment. Neither the summons nor the writ concludes the witness as to this fact. The statement of the magistrate in the summons is not, as contended, in the nature of an adjudication. The magistrate, in issuing his summons, is not acting judicially, but ministerially ; and his subsequent power to attach for contempt of such summons depends upon his power, in the first place, to summon at all. His proceedings are not in the nature of a suit against the witness, that they should, in any contingency, bind him as to the existence of the condition upon which the magistrate had power to act ; and even if he were acting judicially, still the question of his jurisdiction would be open to inquiry, since, if he act out of his jurisdiction, his proceedings would be *coram non judice* and void. The case of *Angell v. Robbins & others*, 4 R. I. 493, has no application to the question here made. In that case the justice was authorized to issue a citation, in favor of an applicant for the poor debtor's oath, to his creditor, upon condition that a change of circumstances of the debtor, since

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the last citation to such creditor, had taken place. Such change was to be proved by the debtor, upon evidence to be submitted to the justice; and so, from necessity, the justice was to determine, upon the proof, whether a change had occurred. As to that question, he was constituted a judge. There is no such provision as to taking depositions; and whether the condition existed, upon which the power to summon is given, is a matter open to inquiry.

We are only to inquire, then, whether there was a civil suit pending, in which the testimony was to be used. The testimony was to be used in the matter of the application of William A. Jenckes to take the poor debtor's oath, then pending before Henry C. Rice, a master in chancery, at Worcester, in the state of Massachusetts. His creditors, Charles W. Freeland & Co., are respondents in that application. This application was to be heard and determined by said master, upon evidence to be submitted before him. The statute of Massachusetts authorized such application, trial, and determination. It is agreed that such a proceeding was pending.

It is however contended by the petitioners, that such a proceeding is not a suit or action, within the meaning of the act authorizing the taking of depositions. This proceeding falls within the definition of a "suit," given by Marshall, C. J., in *Cohens v. Virginia*, 6 Wheat. 407:—"the prosecution, or pursuit, of some claim, demand, or request;" "the prosecution of some demand in a court of justice." It is the pursuit of a right or remedy in form of law. Burrill's Law Dict. 955. This is clearly the pursuit of a right or remedy, given by the laws of Massachusetts, prosecuted in the forms of law, and to be judicially determined. Within the common-law definition of suit, this clearly is of that character; and we see nothing in any of the other sections of this chapter which leads to the conclusion, that the terms "suit or action" were intended to be used in other than the sense of the common law.

On the contrary, in looking at the various provisions of this chapter, it is quite evident that these terms were used in the most enlarged sense, and to enable parties litigant to procure evidence existing here, in all civil controversies. Section 5 au-

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thorizes auditors, referees, arbitrators, masters in chancery, and commissioners to summon witnesses; and section 7, referred to by counsel, and which declares that the witness shall be obliged to attend, if summoned, uses the terms "suit or proceeding." This section relates to the attendance of witnesses, personally, at the hearing of such suit or proceeding. Section 22 provides, that the deposition may be used as evidence in any *cause* in which it may be taken to be used. Section 24 uses the same term, "*cause*." Section 27, providing for the taking of depositions here, by commission from another state, uses the terms "any cause pending in any other government."

We think, from the general scope of this chapter, that it was designed, in the most enlarged sense, to enable evidence to be taken here which may be material or necessary for the determination of all civil controversies pending elsewhere, which may be presented in form of law; and that the power was not intended to be limited to actions, strictly so called, or suits pending in courts of record; but extends to all matters, to be determined by competent authority, acting judicially, and upon proof.

But it is said that though this be a suit within the meaning of the act, it is nevertheless not a *civil* suit, but is *criminal*. It is sufficient to say here, that this has been determined otherwise by the supreme court of Massachusetts,—*Parker v. Page*, 4 Gray, 533, in which it is held to be a civil proceeding.

There was then a civil suit pending, in which the testimony was to be used; and so the condition upon which the magistrate had power to act existed; and upon application for that purpose, it became his duty to summon the witnesses in this case. In contempt of that summons, and of the authority of the magistrate, they refused to obey the summons, or to appear or testify. Had the power of the magistrate ceased here, the whole purpose of section 15, authorizing the taking of depositions, would be defeated. The magistrate would be left without the power of discharging the duty imposed upon him, and the party be as far from procuring the evidence sought, as if the power to summon had not been given.

That the purpose of the act may not thus be defeated, it is

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provided in section 21, that the magistrate shall have the like power to compel the witness to appear and depose, as courts of law have to compel a witness to appear and testify in court. The power is conferred upon him for the same reason that it is conferred upon the court,—that justice shall not fail. It is to be exercised in the same way, by process of attachment against the witness who disobeys the summons. Upon such process, rightfully issued by the magistrate, the petitioners are now imprisoned. They cannot be properly relieved until they appear and submit to testify; and their petition for the writ of *habeas corpus* must be dismissed.

HENRY MARCHANT, Trustee, v. THE VALLEY FALLS BAPTIST CHURCH.

A plea that "said several *supposed* causes of action in said counts mentioned, *if any such there be or still are,*" did not accrue within six years, is defective, for not confessing the causes of action which it seeks to avoid; but, as the defect is formal merely, by force of ch. 184, § 4, of the Rev. Stats., the court must support the plea, though, for this cause, specially demurred to.

ASSUMPSIT, the declaration containing, *first*, a count upon a promissory note for the sum of \$5,000, made by the defendants to the plaintiff on the 26th day of February, 1852, and payable two years after date; *second*, a count on book account, and for goods, wares, and merchandise sold and delivered, and work and labor done,—to the amount of \$5,000; *third*, a count for interest, to the amount of \$2,000; and, *fourth*, a claim of \$9,000, under the money counts.

The defendants pleaded, *first*, the general issue; and, *second*, as to the second, third, and fourth counts of the declaration, the statute of limitations, after the ordinary words of beginning, in this form, "because they say, that *said several supposed causes of action*, in said counts mentioned, (*if any such there were or still are,*) did not, nor did any, or either of them, accrue to the said plaintiff at any time within six years next before the commencement of this suit, in manner and form as the said plain-

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tiff hath above thereof, in said counts, complained against the defendants; and this they are ready to verify. Wherefore," &c.

The plaintiff joined in the general issue, and demurred, specially, to the plea of the statute of limitations, assigning the causes of demurrer as follows:—

That the said plea does not sufficiently confess the said several causes of action in the said second, third, and fourth counts of said declaration; and also, that the said second plea does not give to the said plaintiff color of action in his said second, third, and fourth counts of his said declaration; and also, for that the said second plea is, in other respects, uncertain, informal, and insufficient.

The defendants having joined in the demurrer, the same now came on for hearing.

Brownell, for the plaintiff:—

1st. The plea of the statute of limitations, being a plea in confession and avoidance, should distinctly confess the causes of action set forth in the declaration to which it is pleaded. *Stephen on Plead.* 200; 1 *Chit. on Plead.* 525.

2d. The plea in this case does not sufficiently confess the causes of action, set forth in the declaration, to which it is pleaded. 1 *Chit. on Plead.* 526; *Conger v. Johnston*, 2 *Denio*, 96; *Commercial Bank of Buffalo v. Sparrow*, *Ib.* 105, and cases cited.

James Tillinghast, for the defendants:—

1st. The plea is in the established form given in *Chitty's Pleadings*, and retained in the latest American editions of that work. 3 *Chit. on Plead.* (Springf. ed.) 941; see *Ib.* 956–1031. See also, in trespass, *Ib.* 1067; and these same hypothetical words are retained in other pleas; for example, to the jurisdiction, *Ib.* 894; in assumpsit, of contract made jointly with another, *Ib.* 900–943; in the same, of contract made with the plaintiff, *Ib.* 908–943; of discharge in bankruptcy, *Ib.* 911, 912; *Ib.* 919, 920; of coverture, *Ib.* 907, 910; of infancy, *Ib.* 909–956; in debt, specially not in defendant's possession, *Ib.* 961 *a*; in covenant, of license, *Ib.* 1002; of set-off, *Ib.* 1021, 1022; in trespass, if at all jointly with another, *Ib.* 1061, 1062; even in justifying under public nuisance, *Ib.* 1094.

Marchant, Trustee, v. The Valley Falls Baptist Church.

2d. The principle on which plaintiff relies, applies, in its strictness, only to those pleas, like justification in trespass, which are strictly in confession and avoidance; but the plea of the statute of limitations is not strictly a plea in confession and avoidance. It is not enumerated by Chitty in his examples of defences constituting such. See 1 Chitty on Plead. (Springf. ed.) 515 *a*, &c. § 3. It is a statute bar to the action, like a discharge in bankruptcy; and does not discharge the debt or avoid the cause of action. It only creates a disqualification in the plaintiff, like outlawry, coverture, &c. See 1 Cranch, 466, Appendix B; and the plea of *actio non accrevit*, does not, it would seem, (even without these hypothetical words,) admit that a cause of action ever existed, and, therefore, if the plaintiff's position is correct, is always objectionable in whatever form pleaded. See Wilkinson on Limitations, 111, note (1), (1 Law Library); Ibid. 114, note (8). Ib. Indeed, the objection made in the books to the other form of pleading the statute, (*non assumpsit infra sex annos*), and one reason for preferring this form, (*actio non accrevit*), is, that the former does admit a cause of action before the six years. Blanchard on Limitations, 147, (1 Law Library); Angell on Limitations, 314, § 3.

AMES, C. J. This plea is defective, because, instead of expressly or silently confessing the plaintiff's causes of action which it seeks to avoid, by the introduction of the words "*supposed causes of action in said counts mentioned, if any such there be or still are*," it confesses them only hypothetically; which, in pleading, is tantamount to an argumentative denial of them. *Gould v. Lasbury*, 1 Cr. Mees. & Rosc. 254, 256, 257; *Margetts v. Bays*, 4 Ad. & El. 489; *Lyall v. Higgins*, 4 Ib. N. S. 528, 534, per Patteson, J. This, however, is a mere defect in form, consisting in *the manner* in which that which is substantial is stated in the plea; and in England can be reached only by a special demurrer. *Gould v. Lasbury*, *Margetts v. Bays*, supra. We have already had occasion to decide (*Ellis, Adm'r, v. Appleby & another*, 4 R. I. Rep. 469, 470) that our statute of amendments, unlike the statute of Anne, requires us to give judgment in the cause according to the very right, "without regarding any imperfections, defects, or want of form in the

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writ, declaration, or other pleadings, &c.," and does not qualify its requirement in this respect, as that statute does, by the words "*except the same shall be specially and particularly set down and shown for cause of demurrer.*" Rev. Stats. ch. 184, § 4.

By force of this statute, we can no more regard a mere defect of form, in judgment upon a special, than in judgment upon a general, demurrer ;—and *this demurrer must be overruled.*

SUSAN SPRAGUE v. JOSEPH HULL.

An action of covenant cannot be maintained upon a sealed agreement to submit, under a rule of court, a pending action and all matters in dispute to certain referees, for the non-performance of their award, though the award be established by judgment, unless the agreement of submission contain some stipulation to perform it; the remedy in such case, if it be one that the execution of a common-law court, out of which the rule issues, will not afford, being a remedy in law or equity suited to the case.

COVENANT for the non-performance of an award of referees under a rule of court, brought upon the following deed of submission :—

" SUSAN SPRAGUE v. JOSEPH HULL.

" Action of Trespass. In the case, Susan Sprague, plaintiff, v. Joseph Hull, defendant, commenced at the December term of the court of common pleas in the county of Providence, A. D. 1855, for an alleged trespass upon the property of the plaintiff, the parties in court have agreed to enter the same as a rule of said court; and have mutually agreed to refer said cause, and all other claims and disputes between said parties, as well as any and all other matters concerning the boundary line between their several estates, to Nehemiah S. Draper and James Barnes, of said Providence, who are authorized and empowered to proceed and appoint time and place of meeting, notify the parties thereof, hear their several pleas, evidence, and allegations, and

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report make in said cause, and in relation to said boundary line, as to them shall seem just and equitable; and if said referees shall adjudge that said defendant is guilty of said alleged trespass, they shall estimate and report the amount of damages, and execution shall issue out of the clerk's office, returnable at the next September term, A. D. 1857, for the amount thereof, together with all costs recovered in the action aforesaid; and if they shall report he is not guilty, then they shall award to said defendant his costs of court,—execution to issue, and returnable as aforesaid.

“And it is further understood and agreed, that if either party shall refuse or neglect to attend before said referees, they shall proceed *ex parte*, and the report, so made, shall be final and conclusive between the parties.

“In witness whereof the parties have hereunto set their hands and seals this twenty-seventh day of April, A. D. 1857.

(Signed)

SUSAN SPRAGUE, (L. S.)

JOSEPH HULL, (L. S.)”

The declaration counted upon this covenant, and alleging, that, for the due performance and satisfaction of said agreement, each of said parties thereby covenanted and agreed with the other that whatever judgment might be rendered by the referees named therein should be final and conclusive, further alleged, in substance, that the referees had, amongst other things, awarded that the wall and fence of the defendant, as they then stood, were upon the land of the plaintiff; and having fixed the boundary line of their respective estates, the same to be marked and staked out by a surveyor, had further awarded, that the defendant should remove his wall and fence to the line so marked and staked out, and fill in any vacancy caused by such removal, next to the defendant, prior to December 1st, A. D. 1857. The breach of the covenant, assigned in the declaration, was, that although the boundary line was marked and staked out by a surveyor according to the award of the referees, on the 1st day of August, 1857, the defendant had not, though requested, performed his covenant, “by placing said wall and fence on the aforesaid line,” within the time limited, but had hitherto wholly

neglected and refused, and still did neglect and refuse so to do, contrary to said articles of agreement, &c.

To this declaration, the defendant having pleaded, 1st, *non est factum*; 2d, performance; and, 3d, that there was no such award; and issue having been joined upon these pleas; the case came on for trial before Shearman, J., with a jury, at the December term of the court of common pleas for the county of Providence, 1858. In support of the issues, on her side, the plaintiff proved the execution of the above covenant of submission, and offered in proof the following award of the referees named therein, which it was agreed had been returned to the court of common pleas, and had been received and established by judgment of said court.

“To the honorable court of common pleas.

“Case. SUSAN SPRAGUE, *Plaintiff*, v. JOSEPH HULL, *Defendant*.

“In pursuance of their appointment, the referees in the above case, having been duly engaged, notified the parties of the time and place of meeting, heard their several pleas, evidence, and allegations; and after duly considering the same do *report*, that the wall and fence, as they now stand, are upon the lot of Susan Sprague, the plaintiff; and that the boundary line between the parties is the red line *b* and *y*, as defined on the plat herewith submitted, and made part of this report.

“They further report, that the rights of all parties to the use of the passage-way between the two estates are defined in the bond of Obadiah Sprague, westerly, thirty feet from Stamper Street, the terminus of said passage-way, as specified in said bond, eighteen inches in width beyond or running to rear; said terminus extending to the entrance on his lot, the said Joseph Hull is to have a free and undisturbed passage. From that point the wall and fence are to be set, according to the red line on said plat,—the first being staked out by an engineer or surveyor agreeable to this plat; and that the said Hull remove the wall and fence to said line as shall be marked by said surveyor, and filling in, next to said Sprague, any vacancy caused by said removal, prior to December 1, 1857. The referees further

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award and determine that the costs of court and the referee's fees be taxed equally to both parties.

All which is respectfully submitted.

(Signed) N. S. DRAPER, }
 JAMES BARNES, } *Referees."*

To the introduction of this evidence the defendant objected, substantially, on the ground that it did not support either issue, but showed that the defendant had fully performed his covenant by submitting his rights, in accordance therewith, to the award of the referees; and that the proceedings before the referees and upon their report being had under the provisions of the statute, the remedy of the plaintiff must be according to those provisions, and that a suit at common law could not be maintained on the covenant of submission for the non-performance of the award of the referees. The defendant also moved that a nonsuit should be entered up against the plaintiff.

This objection was overruled by the court, and the motion for a nonsuit refused; and the report having been admitted to pass to the jury in connection with proof that the defendant had not performed the award by removing his wall and fence to the line fixed by the referees, the jury found for the plaintiff upon all the pleas, and assessed damages against the defendant in the sum of one dollar.

The defendant having excepted to this refusal and ruling at the trial, now brought his exceptions to this court for the correction of the errors alleged therein.

Peckham, for the defendant:—

1st. No common-law action can be maintained upon an agreement to submit a cause or controversy, under a rule of court, to referees; the parties contemplating only the statute proceedings and remedy, and the agreement, when the report of the referees is established, being merged in the judgment of the court. Rev. Stats. ch. 188, § 3. The court can vary its execution so as to conform it to the necessity of each case. *Ibid.* ch. 194, § 17. See *Caldwell on Arbitration*, 359, n. 1; *Webster v. Lee*, 5 Mass. 337; *Sargent v. Hampden*, 32 Maine, 78.

2d. From its terms and obvious import, this covenant has

been fully performed by the defendant, by his submission of his rights to the award of the referees named therein, and to the judgment of the court upon their report; and the whole force of his agreement is thereby exhausted. If there is any difficulty in enforcing the award, the remedy is not, certainly, upon a covenant which the defendant has performed. *Sargent v. Hampden*, 32 Maine, 78; *Deerfield v. Arms*, 20 Pick. 480; *Allen v. Chase*, 3 Wisc. 249.

3d. The action derives no countenance from the last clause of the covenant, providing that the referees may proceed *ex parte*, if the parties, upon being notified, do not appear before them, and that notwithstanding such non-appearance, the report shall be final and conclusive upon the parties; all this being merely what the law would have directed and adjudged upon a submission to a rule of court, without such stipulation.

4th. The agreement of submission itself looks to an execution, and not to an action, for the enforcement of the award, and provides in express terms for it; thus showing, that the parties contemplated only the statute mode of enforcing the award. But if an action at common law may be brought, in some form, to enforce the award, it is clear that covenant is not that action.

Bowen, for the plaintiff:—

The covenant contains the usual clause, that the report of the referees shall be final and conclusive. All that the court, to which the report was made, could do by its execution, that is, to issue execution for the plaintiff's costs, has been done; and the remedy for the non-performance of the specific act awarded for the defendant to do, is upon his covenant, to abide by the award.

AMES, C. J. There is no express stipulation in this covenant of submission that either party will perform the award of the referees named therein, nor, from what is stipulated, can any personal covenant to that effect be fairly implied. It is an ordinary agreement, under seal, it is true, to submit a certain action then pending between the parties, and other matters, and especially a boundary line of their respective estates, about which a dispute existed, to certain referees, who were to act under a rule

of the court of common pleas. Every clause in the agreement points merely to this; and, certainly, there is not one which looks farther than the remedy by execution for the enforcement of the award. Without doubt, where this is deficient, as, for the purpose of the specific performance of any other act than the payment of money, it in general is, a court of law, by damages, or a court of equity, by a decree for specific performance, would furnish to the plaintiff a remedy, based upon the award, suited to his case; but, because the agreement of submission is sealed, it by no means follows that an action of covenant upon it is such remedy. It may be, if the covenant contains a stipulation to perform the award; for, defective as the execution of a common-law court must necessarily be to enforce all that may be awarded under so general a submission as this, we see no objection to the parties providing, by personal covenants to perform the award, for contingencies which an ordinary execution cannot reach. But then there must be such a covenant before the party can claim, in an action of covenant, damages for its non-performance; and a mere covenant to submit to a rule of court is not, and has not been deemed to be, such a covenant.

The evidence objected to by the defendant in the court below, so far from tending to prove a breach of the covenant upon which he was sued, clearly showed that he had performed it by submitting his rights to the final award of the referees in whose choice he had concurred, and did not tend to support the issue upon which damages were assessed against him. The court erred in admitting it for such a purpose, and, as the verdict shows, to the injury of the defendant. The verdict must, therefore, be set aside, and a new trial granted.

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Where the jury, after having retired to consider their verdict upon an indictment charging a statute offence, sent for, and procured, through the officer in attendance upon them, a copy of the Revised Statutes for use in their deliberations, without the knowledge and consent of the court or counsel, their verdict, convicting the defendant, was, upon his motion, set aside, and a new trial granted to him.

THE defendant was convicted, at the present term of the court, of keeping a certain common nuisance, to wit, a grog-shop, tippling-shop, &c., at Providence; and now moved for a new trial, on the ground, *first*, that the officer who attended the jury, after the cause had been committed to them, did, at the request of the jury, or of some one or more of them, before they had agreed upon a verdict, and without the knowledge or consent of the defendant, or of his counsel, or of the court, procure and deliver to the jury, in the jury room, the Revised Statutes of the state, for their information, guide, and instruction in the cause; and, *second*, because the court refused to continue the cause, upon the motion of the defendant, or to postpone the trial of the same, under circumstances which were set forth in the motion, but which it is not necessary to detail, as the judgment of the court turned entirely upon the first cause set forth in the motion.

It was agreed that the jury, after having been instructed by the court in the law applicable to the case, did send, through the officer in attendance upon them, and procure, a copy of the Revised Statutes, for use in their deliberations upon the cause.

Ripley, for the defendant, cited, to the first ground for new trial, Wharton's Crim. Law, 1015, and cases cited; *Burrows v. Unwin*, 3 C. & P. 310; S. C. 14 Eng. C. L. Rep. 322; *State v. Farrar*, 2 Ohio, 57; *Thompson v. Mallet*, 2 Bay, 94; *Lott v. Macon*, 2 Strobh. 178, 410; *Whitney v. Whitman*, 5 Mass. 405; *Sargent v. Roberts*, 1 Pick. 337; *Hix v. Drury*, 5 Ib. 296; *Sheaff v. Gray*, 2 Yeates, 166, 273; *Lonsdale v. Brown*, 4 Wash. C. C. R. 148; *Barrows v. Fish*, 6 Greenl. 141; *Paine v. Van Nat*, 1 Smith, 146; *Peacham v. Corbet*, 21 Verm. 515; *Taylor v.*

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Sarsley, Walker, 97; *Walker v. Hunter*, 17 Geo. 364; 8 Barb. Sup. Ct. R. 46; Rev. Stats. ch. 164, § 26.

Kimball, attorney-general, for the state:—

It is irregular for the jury to take with them into the jury room any books or papers not put into the cause as evidence.

The delivery, by the officer in attendance to the jury, at their request, of the statute book which had been read from and commented upon by the counsel and court, during the trial, is not, however, a sufficient ground for a new trial. *Commonwealth v. Jenkins*, Thatch. Crim. Cas. 118; *United States v. Gilbert et al.* 2 Sumn. 21, 81, 82.

AMES, C. J. The line between the duties of a court and jury, in the trial of causes at law, both civil and criminal, is perfectly well defined; and the rigid observance of it is of the last importance to the administration of systematic justice. Whilst, on the one hand, the jury are the sole ultimate judges of the facts, they are, on the other, to receive the law applicable to the case before them, solely, from the publicly given instructions of the court. In this way court and jury are made responsible, each in its appropriate department, for the part taken by each in the trial and decision of causes, and in this way alone can errors of fact and errors of law be traced, for the purpose of correction, to their proper sources. If the jury can receive the law of a case on trial in any other mode than from the instructions of the court given in the presence of parties and counsel, how are their errors of law, with any certainty, to be detected, and how, with any certainty, therefore, to be corrected? It is a statute right of parties here, following, too, the ancient course of the common law, to have the law given by the court, in their presence, to the jury, to guide their decision, in order that every error in matter of law may be known and corrected. By chapter 164, sect. 26, the supreme court, and by chapter 165, sect. 13, the court of common pleas, are required, "in every case, civil and criminal, tried in said courts, with a jury," to "instruct the jury in the law relating to the same;" and by other statutes, motions and petitions for new trial and bills of exceptions are provided, as the means by which these open instructions may be reviewed, for the correction of any errors into which the courts may have fallen in giving them.

The motion before the court is, in part, grounded upon a violation of this statute right by the jury who convicted this defendant. Notwithstanding they were fully instructed by the court in the law applicable to the statute offence on trial, in the presence of all interested, not being satisfied, it would seem, they send for and obtain, without the knowledge of court, counsel, or parties, the statute book, for no other conceivable purpose than that they may understand and expound the statute for themselves.

It is unnecessary to say, that this book was the proper guide of the court in expounding the law of the case on trial to the jury, but not of the jury, without such exposition, suited to their doubts and difficulties, accompanying it. In *Burrows v. Unwin*, 3 C. P. 310, S. C. 14 Eng. C. L. Rep. 322, Lord Tenterden refused to allow the jury, who had sent for Selwyn's Law of Nisi Prius, to have the book, though the counsel on both sides expressly stated that they had no objection; his lordship saying, "The regular way is for the jury to come into court and state their question, and receive their law from the court; and for the sake of precedent that course should be adopted now." But, here, the jury sent for and obtained the book they wanted for use, ignorant, no doubt, of the impropriety of so doing, without the knowledge of the court, or of the defendant, or of his counsel, or of the attorney-general; receiving, as it were, their instruction in matter of law, not only from a source not open to them as jurors, but secretly, in the absence of parties and counsel, and without those checks and guards which the law places about trials for the security of the rights involved in them. In *Sargent v. Roberts*, 1 Pick. 337, a new trial was granted, because the judge who tried the cause, upon receiving, after the adjournment of the court, a letter from the foreman, informing him that the jury could not agree, and that they waited his directions, returned an answer in writing, that he was unwilling, after so much time had been consumed, to permit them to separate, and then proceeded, in his reply, to give them such directions as would enable them to reconsider the cause in a more systematic manner. It seems, from the opinion of the court, that this course was taken by the distinguished judge who tried

the cause, under the sanction of an old practice prevailing in Massachusetts, which allowed such communication between the court and jury in relation to a cause which had been committed to the jury, and about which they had difficulty in coming to an agreement; but to condemn a practice so dangerous to the rights of parties and so opposed to the spirit of the common law, which demand that everything given to a jury in relation to a case before them should be given in open court, in the presence of all interested or authorized, for criticism, for suggestion, to guard against injustice and error, and to afford the means of remedying or correcting them, the verdict was, after full hearing, set aside, and a new trial granted. In *Farrar v. The State of Ohio*, 2 Ohio, R. (N. S.) 54, 57, 58, 77, a new trial was granted, because it appeared that the jury, after the cause had been submitted to them, obtained and read a newspaper report of the charge delivered to them in the very cause which they were considering, although it was agreed that the report, in some parts condensed, was correct.

In short, without the aid of authority, if a party, and especially one criminally convicted, shows to us that so well defined a right of trial, as that the jury should receive the law of the case before them, solely, and openly, from the court, has been violated in his person, we dare not refuse him a new trial, to be conducted in the mode which the constitution, as well as the common and statute law, accords to him. If we did, he might well complain that in a criminal prosecution his trial had not been, in one particular, "public;" that, in matter of law, he had not had, in the full sense, "the assistance of counsel in his defence," or "the liberty to speak for himself;" and that he had been deprived of his liberty or his property in a mode unknown to the common law, or "the law of the land."

As for this cause the verdict must be set aside, and a new trial granted; it is unnecessary to consider the other ground for new trial, set down in the motion. *New trial granted.*

EBER BARTLETT v. HENRY BROWN.

One who had taken the growing fruit of another without leave, was prosecuted therefor on a criminal complaint, which charged, that he "feloniously did steal, take, and carry away cultivated fruit, to wit, ripened cherries, being and growing upon the land and possessions of the complainant, &c.," which complaint was quashed. *Held*, that an action for malicious prosecution could not be maintained by the accused, though the accusation were maliciously made; the complaint being, not for theft, but substantially for trespass, under ch. 214, § 20, of the Revised Statutes, with words of harsh surplussage, and it having been proved that the plaintiff committed the trespass.

Where, in such case, the prosecutor, a laboring man, truly stated his cause of complaint to a counsellor at law for his advice and direction, and pursuing that advice, signed and swore to a complaint, as aforesaid, prepared for him by the counsellor under a misrecollection of the statute, the misnomer of the offence in the complaint will not support an action for malicious prosecution, even in case of the most express malice in prosecuting; inasmuch as there was probable cause for the prosecution, in the form in which it was made.

CASE for malicious prosecution; the declaration alleging, that the defendant maliciously and without probable cause, on the first day of July, 1853, complained to Spencer Mowry, Esq., one of the justices of the peace of the county of Providence, against the plaintiff, that the plaintiff feloniously did steal, take, and carry away cultivated fruit, to wit, ripened cherries, being and growing upon the land and possessions of the plaintiff, said fruit and cherries being the property of the defendant, and caused the plaintiff to be arrested, and to give recognizance with surety, for his appearance before said justice on the 9th day of July, 1853, on which day the complaint was abated, and the plaintiff discharged, &c. Plea, the general issue.

At the trial before the court, to whom the case was submitted in law and fact, the plaintiff proved, that on the first day of July, 1853, the defendant preferred a complaint against him, under oath, to Spencer Mowry, Esq., one of the justices assigned to keep the peace within the county of Providence, in which it was charged, that the defendant, "feloniously did steal, take, and carry away cultivated fruit, to wit, ripened cherries, being and growing upon the land and possessions of the complainant, said fruit and cherries being the property of the said complainant," and, on the same day, procured him to be arrested, and

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brought before the magistrate, upon the warrant issued upon said complaint; that, upon the plaintiff's recognizing for his future appearance, with surety, the hearing of the complaint was, upon the plaintiff's request, adjourned until the 9th day of July, 1853, when the magistrate quashed the proceeding because the complaint did not allege, in the language of ch. 214, § 20, of the Revised Statutes, that the fruit was taken and carried away "without the consent of the owner thereof." The plaintiff also produced proof tending to show, that the defendant was induced to prefer the complaint by certain persons in the village of Woonsocket, who had been prosecuted for the illegal sale of strong liquors, and against whom the plaintiff was a witness, with the view, by a conviction of the plaintiff for theft, to disqualify him as a witness in such prosecutions.

The defendant, besides producing proof tending to exculpate him from the above charge of special malice, called witnesses, whose testimony strongly tended to prove, that the plaintiff had, whilst passing by the defendant's house on his way to his work, at several times, picked cherries from the cherry-trees of the defendant, which overhung the highway or street. He also proved that, having ascertained this fact, he laid his case before a regular practising attorney in Woonsocket, who took such steps as he deemed advisable, and drew the complaint in question, as that appropriate to the case.

Ballou, with whom was *Payne*, for the plaintiff:—

A defect in the complaint, though the plaintiff were acquitted in consequence of it, would not prevent him from maintaining an action for malicious prosecution. *Wicks v. Fentham & another*, 4 T. R. 247; *Jones v. Gwynn*, 10 Mod. 214, 216.

Robinson, for the defendant, cited *Reg. v. Turweston*, 1 Eng. L. & Eq. 317; *Commonwealth v. Pray*, 13 Pick. 359; *Commonwealth v. Squires*, 1 Met. 256.

AMES, C. J. The action for malicious prosecution supposes not only the plaintiff's innocence of the charge upon which he has been prosecuted, but want of probable cause of his guilt. The grounds of it are, "on the plaintiff's side, innocence, and on the defendant's, malice;" per Parker, C. J., *Jones v. Gwynn*, 10 Mod. 217; and if there be *real* guilt, or *apparent* guilt believed

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by the prosecutor to be real, the most express malice in prosecuting will not support the action. *Johnstone v. Sutton*, (in Error,) 1 T. R. 544.

In the case before us, it seems, that the defendant procured the arrest of the plaintiff, upon the charge, that he feloniously stole, took, and carried away cultivated fruit, to wit, ripened cherries, the property of, and growing upon, the lands of the defendant; which, inasmuch as theft cannot be committed of such a subject, is not a defective charge of theft, but a harsh mode of charging our statute offence of taking growing fruit without license of the owner. If the defendant had spoken such words of the plaintiff, proof of them would not have supported an action by the latter for a slanderous accusation of theft, but would be deemed to amount to a charge of trespass only; and, whether written or spoken, the legal construction of them must be the same.

Had this substantial charge been false, as well as malicious, it would, on account of the vexation and expense caused by it, have supported an action for malicious prosecution. We are satisfied, however, from the proof, that the plaintiff did, on more than one occasion, pick cherries from the trees of the defendant, as he passed under them along the street, without his leave. The complaint, therefore, though containing words of harsh surplusage, was substantially true, and, upon this ground, the defendant is entitled to judgment.

But if this were otherwise, there is another ground, upon which, as it seems to us, the defence to this action is full. We are satisfied from the proof, that the defendant fully and fairly submitted his cause of complaint against the plaintiff to a counsellor of this court, residing in Woonsocket, for his professional advice and aid; that under his direction the complaint was made; and that, the complaint being filled in with his own hand, its objectionable form was caused by his misrecollection of the statute concerning the taking of growing fruit, or, at any rate, without fault or neglect on the part of the defendant. There is no evidence which leads us to suspect, that the defendant, a laboring man, doubted, or had cause to doubt, the soundness of the legal advice given to him, or suspected even

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when he signed and swore to the complaint prepared for him by a professional man, that there was a misnomer of the offence therein charged. To the defendant, then, it was a case of apparent guilt of theft, believed by him to be real; and this, according to the resolution of the judges, reported to the House of Lords by Lords Mansfield and Loughborough in the case of *Johnstone v. Sutton*, before cited, will not support an action for malicious prosecution, even though the most express malice be proved in the prosecutor. In other words, though there be malice, there is probable cause; and the former must concur with the want of the latter, to the maintenance of the action.

Although there has been some question how far the advice of counsel can shield a defendant in an action of this sort, yet the weight of authority, and, as it seems to us, the more reasonable opinion is, that if the defendant is not in fault, but has been wrongly advised as to his rights, upon a state of facts fully and fairly presented by him to a professional man whose candor and skill he had no reason to doubt, the advice will be a sufficient protection for him. *Hewlett v. Cruchley*, 5 Taunt. 277; *Snow v. Allen*, 1 Starkie, 409; *Ravenga v. Mackintosh*, 2 B. & C. 693; *Blunt v. Little*, 3 Mason, R. 102; *Stone v. Swift*, 4 Pick. 393; *Tompson v. Mussey*, 3 Greenl. 310; *Stevens v. Fassett*, 27 Maine, (14 Shepl.) 266; *Hall v. Suydam*, 6 Barb. Sup. Ct. R. 83; *Walter v. Sample*, 25 Penn. State R. (1 Casey) 275; *Kendrick v. Cypert*, 10 Humph. 291; *Chandler v. McPherson*, 11 Ala. 916; *Williams v. Vanmeter*, 8 Mis. 239; contra, *Clements v. Ohrlly*, 2 Car. & Kirw. 686, 689, per Lord Denman.

For these reasons, our judgment must be for the defendant.

STATE v. JOHN CROGAN.

Justices of the peace, and courts of magistrates exercising the jurisdiction of justices of the peace, have jurisdiction over the offence of selling liquor in violation of ch. 78, § 16, of the Revised Statutes; and the supreme court has jurisdiction to entertain appeals, in such cases, from such justices and courts.

APPEAL to this court from the sentence of the court of magistrates of the city of Providence, passed upon the defendant,

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after trial, for selling liquor, without authority, in Providence, in violation of chapter 78 of the Revised Statutes.

The appeal was tried with a jury in this court; and a verdict of guilty having been returned against the defendant, he interposed a motion in arrest of judgment, *first*, because the court of magistrates before whom the complaint was originally made had no jurisdiction of the offence; and, *second*, because the supreme court had no jurisdiction of the appeal.

Thurston, for the motion :—

1st. The court of magistrates before which said complaint was originally brought and tried, had not jurisdiction. Rev. Stats. p. 197, § 16; Ibid. 552, § 2. The court of magistrates could not inflict the whole extent of punishment. Ibid.; *Commonwealth v. Curtis*, Thatcher's Cr. Cas. 202.

2d. The supreme court has no jurisdiction of such complaints on appeal from a justice court, or a court exercising the jurisdiction of a justice of the peace. Rev. Stats. p. 198, § 22. When a new jurisdiction is given to, or a new remedy offered by a common-law court, neither the jurisdiction nor the remedy is to be extended beyond the legislative grant. *Pringle v. Coster*, 1 Hill, (S. C.) 53; *Thurston v. Prentiss*, 1 Mann, (Mich.) 193. If a statute create a new offence or cause of action, and provide that a particular tribunal shall take cognizance of it, no other court can enforce the law. *Aldrich v. Hawkins*, 6 Blackf. 125; *White v. Canover*, 5 Ib. 462. When a new right is introduced by statute, the party complaining of its violation is confined to the statutory remedy, if one be prescribed. *Long v. Scott*, 1 Blackf. 405; 6 Mass. 40. The word "may," in ch. 198, § 22, of the Revised Statutes, means must or shall. *Mason et al. v. Fearson*, 9 How. 248; Carth. 298; *King v. Inhabitants of Derby*, Skin. 370; *Schuyler Co. v. Mercer Co.* 4 Gilm. 20; *Mower v. Mechanics Bank of Alexandria*, 1 Pet. 64; *Renwick v. Morris*, 7 Hill, 575.

The *Attorney-General* was stopped by the court.

BRAYTON, J. The defendant, upon complaint before the court of magistrates of the city of Providence, exercising the jurisdiction of a justice of the peace, was charged with selling

and suffering to be sold, strong liquors, contrary to the provision of ch. 78, § 16, of the Revised Statutes. He was tried before that court, convicted, and sentenced; and thereupon appealed to this court. After entering his appeal here he was tried before a jury, who returned a verdict of guilty. He now moves in arrest of judgment, and for two causes assigned by him; *first*, that the court, to which the original complaint was made and by which the cause was tried, had no jurisdiction of the offence charged; and, *secondly*, that supposing the court had jurisdiction to try and convict, yet that the appeal was not properly taken to this court, but should have been carried to the court of common pleas; this court having no jurisdiction over the appeal.

As to the first point, we think it quite clear, that the court of magistrates had jurisdiction of the offence charged.

The statute defining the jurisdiction of justices of the peace provides, that "every justice of the peace within the county in which he resides shall have jurisdiction and cognizance of all crimes, offences, and misdemeanors done or committed within the said county, punishable by fine of twenty dollars, or by imprisonment in the county jail not exceeding three months, and of all other criminal matters which are or shall be declared specially to be within his jurisdiction by the laws of this state, which shall be legally brought before him; with power to proceed to trial, render judgment, pass sentence, and award a warrant for execution thereof."

Section 16, chapter 78, of the Revised Statutes, (and the offence charged is one against the provision of this section,) provides, that for the *first* offence, the person convicted shall be sentenced to pay costs, and a fine of \$20, and to imprisonment for ten days; for a *second* offence, he may be sentenced to pay costs, and a fine of \$20 and to imprisonment for three months; and for any subsequent offence, to pay a like fine and costs, and to imprisonment for six months.

The statute, before recited, gives to justices of the peace jurisdiction to hear and determine all offences where the punishment prescribed does not exceed a fine of \$20, or an imprisonment exceeding three months.

The offence charged is that of selling strong liquors. It is punishable by fine of \$20, one within the power of a justice of the peace to inflict, and by imprisonment of ten days, a punishment also within his power.

Section 40 of this chapter provides, that it shall not be necessary in any complaint, warrant, or indictment, for such officer to set forth any former conviction, but that any such conviction may be proved in the same manner, and with the same effect, as if it had been alleged.

In view of this provision, it is contended, that inasmuch as it is open to proof upon the trial, to show, that the defendant had been twice convicted, so that this was a third offence, and that the justice could not sentence to the punishment prescribed for a third offence, viz., imprisonment for six months, his jurisdiction fails. It must be noted, that defendant's motion is in arrest of judgment, and must therefore be for causes apparent upon the record, and for no others. The charge, as it appears upon the record, is one within the jurisdiction of a justice of the peace to convict and sentence. There is nothing on the record to show it other than an offence punishable by a fine of \$20, and by an imprisonment of ten days. To make it appear that it was anything beyond this, we must go beyond the record. The defendant was found guilty, by the court below and by the jury here, of no other offence. The record shows, not only that no other offence was alleged, but that no other was proved.

If, however, it were questionable, whether a justice of the peace or court of magistrates had jurisdiction of offences against the 16th section, so far as they are punishable by fine and imprisonment to the extent before mentioned, all doubt must be removed when we turn our attention to the provision of section 22 of the same chapter. The implication here is too strong to be overcome, that in contemplation of this chapter justices of the peace were to have jurisdiction of offences under and against the 16th section. The 22d section provides for appeals in case of conviction, and is, "Any person convicted before a justice of the peace, or a court exercising the jurisdiction of a justice of the peace, of any offence under the

sections *just mentioned*, may appeal, &c., to the court of common pleas next to be holden in the same county after ten days." One of the sections just mentioned and here referred to, is this 16th section ; so that the jurisdiction of a justice of the peace over offences under this section is expressly recognized. It is entirely clear, that the court of magistrates which tried this cause below, had jurisdiction.

It is, however, contended, *secondly*, that though the conviction below was right, yet that this court have no jurisdiction to entertain an appeal from a conviction in such case.

By ch. 221, § 1, relating to appeals from justices of the peace in criminal cases, it is provided, that " Any person aggrieved at any sentence of any magistrate, justice of the peace or court, &c., pronounced against him on any complaint for threats, assault and battery, or both, or for theft, or for any offence which is or shall be within the jurisdiction of such magistrate to try and determine, may appeal from such sentence to the supreme court or to the court of common pleas, then next to be holden in the same county after ten days." This provision covers every case of conviction before a justice of the peace, and gives the party convicted liberty to appeal to this court. It is said, however, that where, by the 22d section before recited, of chapter 78, it is provided, that a defendant convicted by a justice of the peace under that chapter, *may appeal* to the court of common pleas, and by the next section, in case of appeal is required to give recognizance that he will enter his appeal in the court appealed to, the words "*may appeal*" are to be construed to mean "shall appeal;" and so, the statute intended to compel an appeal to the court of common pleas only. It might be a sufficient answer, to say, that the terms used in chapter 221, in relation to appeals, are identical with those of section 23 of chapter 78, and, therefore, leave the word "may," in either case, to its natural signification, implying liberty in the party to appeal. It is also said, that this is an offence newly created, and for which a jurisdiction is specially provided, at least so far as the appeal is concerned. If it were true that this offence were one newly created, there might be force in this argument; but this offence existed upon the statute book long before the Revised

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Statutes went into effect, and was not then for the first time created. We need not, however, trouble ourselves with considerations of this kind. It is apparent, that this particular provision for appeal to the court of common pleas was not put into this chapter in the revision from any design to give it any special operation, or because it was necessary to any purpose of that chapter. By referring to section 42 of the same chapter, this is made manifest. The only express provision for appeal in this chapter is that contained in section 22; yet the 42d section fully recognizes appeals to the supreme court, as well as appeals to the court of common pleas. It provides for the conducting of appeals from sentences of justices and magistrates, both in the supreme court and court of common pleas. It fully recognizes, and by implication affirms, the right of persons convicted of offences under this chapter to take their appeals to either court.

The defendant's motion must be overruled.

HEYER, BROTHERS, v. JOSEPH FLAGG CARR & another.

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In trover against two for a joint conversion, the plaintiffs obtained judgment by default against one, and then withdrew their action against the other, upon receiving from him partial satisfaction for the wrong, and agreeing no further to prosecute him personally therefor. *Held*, that damages might be assessed against the defaulted defendant for the value of the goods converted, with interest from the time of conversion, deducting therefrom the amount received from his codefendant, by way of compromise, for his liability.

TROVER for a quantity of toys and fancy goods, belonging to the plaintiffs, and alleged to have been converted by the defendants, Joseph Flagg Carr and Norman P. Little, jointly, on the 29th day of November, 1858.

The action was brought, originally, in this court; and the defendant Little, having suffered judgment to pass against him by default, the plaintiffs, upon receiving from the defendant, Carr, who had answered the action, the sum of \$70.82, and costs, had discontinued the action as to him, and given him a

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receipt for the sum received of him as above. This sum was not received in settlement of the cause of action, which it was understood the plaintiffs were to be at liberty to prosecute against Little; but as the price of discontinuing this suit, and no further prosecuting the cause of action, against Carr.

Eddy, for the plaintiffs, having proved that the value of the goods, at the time of conversion, was \$283.28, now moved, that damages be assessed against the defendant Little, in the sum of \$219.36, being the value of the goods converted, after deducting the payment made by Carr, with interest from the time of conversion.

AMES, C. J. The plaintiffs are entitled to assess against the defaulted defendant the value of the goods converted, with interest from the time of conversion, deducting therefrom the amount received by them of the other defendant for his personal discharge. The receipt of an agreed satisfaction for a breach of contract, or for a tort, from one joint contractor or tort-feasor, is, indeed, a good defence to the others against liability for the same breach of contract, or tort. This defence proceeds upon the substantial ground, that the cause of action has been extinguished against all by full compensation received from one; and not upon the mere release of one, except so far as such release is evidence of full compensation, or renders pursuit of the others, by action, impracticable, according to the rules regulating legal remedies. Accordingly, a technical release, upon composition, of one of two copartners from a debt of the firm, with a proviso that it shall not discharge or affect the remedies, whether joint or several, against the joint estate, or the other copartner personally, will not, when pleaded, have that effect; and, *a multo*, a mere receipt will not, if given and received as evidence only of a partial satisfaction of a joint and several claim. *Solly v. Forbes*, 2 Brod. & Bing. 38; S. C. 6 Eng. C. L. Rep. 11; *Thompson v. Lack*, 3 Mann., Grang. & Scott, 540; S. C. 54 Eng. C. L. Rep. 540, 551, 552; *Waters v. Smith*, 2 B. & Adolph. 889; S. C. 22 Eng. C. L. Rep. 205-207; *Field v. Robbins*, 8 B. & Adolph. 90; S. C. 35 Eng. C. L. Rep. 333-335.

In this case we are disembarassed from all technicalities

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growing out of the cause of action, the nature of the discharge, or the rules pertaining to the remedy. A tort is joint and several; the discharge was by receipt only, and personal to one tort-feasor, for his share of the wrong; and the plaintiffs had obtained judgment by default against one defendant, before they settled with, and withdrew their action against, the other. The remaining defendant is, certainly, the last person who can complain of such a settlement; since, being, and acknowledging himself, liable for the whole damages of the joint wrong, by means of this compromise with his codefendant, he has the advantage, in his own discharge *pro tanto*, of whatever the plaintiffs have received by virtue of it.

Let judgment be entered against the defendant, Little, for the sum of \$219.36.

DUTY EVANS v. THE COMMERCIAL MUTUAL INSURANCE COMPANY.

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Where, under a policy on all iron purchased by, or consigned to, the insured, insurance was effected by him on "808 bundles rods" at and from Liverpool to Providence, via New York and Boston, and the policy provided, "that said company shall not be liable for any partial loss on bar or sheet iron, iron wire, hoop iron, tin plates, ice, salt, grain of all kinds, &c.; nor for any partial loss on hemp or flax, unless the same shall amount to 20 per cent. on the whole aggregate value thereof," &c.; *Held*, in case of a partial loss claimed on the bundles of rods insured, that the court cannot determine as a matter of law, whether "bundles of rods" are "bar iron," within the meaning of the proviso, but that the same is a question of fact to be submitted to the jury; that, to the meaning of these terms in the trade, the testimony of any persons connected with it, whether as manufacturers, retail dealers, or workers in iron, as well as of insurers of iron or merchants effecting insurance upon it, was admissible in evidence;—but that such testimony might be controlled by evidence of a usage to treat "bundles of rods" as "bar iron" under the above proviso, in the adjustment of losses upon such policies; to which usage only the testimony of insurers, insurance brokers, and merchants accustomed to make and settle losses upon contracts of insurance upon such subjects, should be admitted.

Held, also, that the rule to ascertain the amount of a partial loss was, by deducting the gross produce of sales of the damaged goods, at the port of arrival, from the gross produce of the sales of such goods if they had arrived sound, to ascertain the proportion or percentage of loss, and to take that percentage upon the cost of the goods insured, or their value in the policy, as the amount which the insurer is to pay; but that under the above proviso the insurer was exempted from any partial loss on "bar iron," though the same exceeded 20 per cent.; but that, where the jury, being misinstructed

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in this last particular, found for the plaintiff, under the general issue, a partial loss, exceeding 20 per cent., but also found specially, upon the evidence, that "bundles of rods" were not "bar iron," the misinstruction was no ground for new trial.

ASSUMPSIT, by an importer and dealer in iron, to recover a partial loss under a policy of insurance, effected by him with the defendants, on all iron purchased for him, or consigned to him, at and from Liverpool, to Providence, via New York or Boston, by vessel or vessels, against loss or damage on the high seas, and elsewhere. At the trial before Mr. Justice Bosworth, with a jury, at the present term of this court, it appeared, that on the 4th day of September, 1852, the plaintiff took out a policy from the office of the defendants, "on all iron, purchased for him, or consigned to him, at and from Liverpool to Providence, via New York or Boston, by vessel or vessels; commencing the risk on the 1st instant, and to continue until notice is given by either party to the other, in writing; due notice in all cases to be given to the company on receiving information of shipments;" and that the plaintiff, having purchased at the cost of \$969, and ordered to be shipped to him from Liverpool, 808 bundles of slit iron rods, on the 21st day of March, 1856, gave notice of the same, under his policy, to the defendants, who, by their secretary, indorsed thereon the following memorandum of insurance:—

"1856. No. 32. Duty Evans.

"March 21. \$1,100, on 808 bundles rods, on board the ship Chattahoochee, at and from Liverpool to New York, and thence to Providence, as customary, at $1\frac{1}{4}$ less $1\frac{1}{2}$ 13.55.

(Signed) J. A. BUDLONG, Sec'y."

The iron, which was duly shipped in the Chattahoochee, arrived at New York, but was found, when broken out and discharged, to be more or less wet, rusted, and damaged by salt water. The plaintiff produced evidence tending to prove that this damage was caused by an excess of water in the bilges of the vessel, caused by its careening in heavy gales, which forced the water beyond the reach of the main pumps of the ship, and where her bilge pumps had neither power nor capacity to free

her. The policy contained the following clause descriptive of the perils insured against and limiting the liability of the insurers in case of partial losses :—

“ And the said Commercial Mutual Insurance Company agree to bear and take upon themselves, in the voyages described in said endorsements, the danger of the seas, of fire, enemies, pirates, overpowering thieves, restraints and detainerments of all kings, princes or people, of what nature or quality soever; barratry of the master [unless the insured be owner of the vessel] and of the mariners; and all other losses or misfortunes that have or shall come to the damage of said property or any part thereof, to which insurers are liable: *Provided*, that said company shall not be liable for any partial loss on bar or sheet iron, iron wire, hoop iron, tin plates, ice, salt, grain of all kinds, Indian meal, tobacco not manufactured, peas, beans, hayseed, fruits, (whether preserved or otherwise,) hams, cheese, dry fish, vegetables and roots, molasses, hempen yarn, cotton bagging, pleasure carriages, household furniture, skins or hides, musical instruments, looking-glasses, or any articles that are perishable in their own nature: nor for any partial loss on hemp or flax, unless the same shall amount to twenty per cent. on the whole aggregate value thereof; nor for any partial loss on cutlery, hardware, flour, butter, lard, sugar, rice, manufactured tobacco, flaxseed, bread, coffee, pepper, or on vessels valued at less than ten thousand dollars, unless the same shall amount to ten per cent. on the whole aggregate value of such articles, or the agreed value of such vessel: nor for any partial loss on any other articles, or vessels or freights, unless it amounts to five per cent. on the aggregate or agreed value thereof; exclusive in each case of the charges or expenses incurred for the purpose of ascertaining and proving the loss; but the insured shall recover on a general average.”

It further appeared from the evidence, that upon the arrival of the iron at Providence, it was sold by the plaintiff at auction, in one lot, and bid in for himself, at the price of \$1244.32, cash, and subsequently sold by him for the sum of \$1583.68, at six months.

The defendants resisted payment of the claim of the plaintiff

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under this policy ; *first*, on the ground, that inasmuch as he had sold the iron at the port of delivery for a price greatly exceeding what he had paid for it at the port of lading, he had sustained no loss recoverable under the policy ; and *second*, because, as a matter of law, bundles of rods were, as "bar-iron," excepted from partial losses, by the above quoted clause of the policy. The judge presiding at the trial overruled these grounds of defence ; whereupon much testimony was adduced on both sides for the purpose of showing the meaning of the word "bar-iron" in the iron trade ; the plaintiff contending that it did not, and the defendant that it did embrace "bundles of slit rods," for the purpose of showing, on the one side, that it was without, and on the other that it was within, the above exception.

In the course of his evidence, the plaintiff offered the evidence of blacksmiths and retail dealers in iron, to prove the meaning of the phrases, "bar-iron," and "bundles of rods," in the trade ; to which the defendants objected, on the ground, that no witness should be allowed to testify upon this point, except importers, accustomed to insure iron, or insurers, insurance brokers, and the like ; the question involving the meaning of these phrases in a policy of insurance. The court, however, admitted the testimony, as well as the testimony of importers, insurers, &c. on both sides, as to the customary meaning of the phrase in question in the trade.

Appended to the bill of lading and receipt for duties at the custom-house in New York, put in evidence by the plaintiff, was an application by the plaintiff to the collector of that port, made by an agent, for a partial remission of duties in consequence of the damaged state in which the iron had arrived, together with the report of an appraiser, that the damage was twenty per cent. ; and it appearing that the plaintiff had through his agent paid duties according to this appraisalment of the partial loss, the defendants requested the court to charge the jury, that the plaintiff was concluded by this act of his own agent as to the amount of damage by the perils of the sea between Liverpool and New York, which the judge presiding at the trial refused to give.

The defendants also requested the court to charge the jury

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that if they found the subject of insurance to be "bar-iron," within the meaning of the above quoted clause of the policy, that the insurers were not liable for any partial loss thereon, which the judge presiding at the trial refused to do; but did charge the jury, that, within the meaning of that clause, they must find for the plaintiff any partial loss upon the subject of insurance, if "bar-iron," provided such partial loss exceeded 20 per cent. of the value thereof, and if not bar-iron, provided the partial loss exceeded five per cent. on the value thereof.

The defendants duly excepted, at the trial, to the above rulings and instructions of the court, and the jury having found, specially, that "bundles of rods" were not "bar-iron" within the sense of the policy, and assessed the plaintiff's damages at \$500, the defendants now moved for a new trial upon the ground of errors in matter of law committed by the judge presiding at the trial in these rulings and instructions.

T. A. Jenckes, for the motion, argued the several grounds by him taken at the trial; and cited, to the point, that there was no loss in this case upon which the plaintiff could recover, comparing the cost of the iron at the port of shipment with what it brought at the port of delivery, 2 Arnould on Ins. 964; and to the points, that the court should have ruled, as a matter of law, that "bundles of rods" were within the articles excepted in the policy from partial loss, and that the testimony of other witnesses than those familiar with the adjustment of losses upon policies on iron was inadmissible to prove the meaning of the phrases "bar-iron" and "bundles of rods" for the purposes of the trial, he cited, 1 Ibid. 76; Park on Ins. 149, 160, 161.

W. H. Potter, against the motion, cited, to the rule of ascertaining the amount of a partial loss adopted by the court at the trial, Archbold's Nisi Prius, 208; 2 Wheaton's Selwyn, 992; that parol evidence is admissible to show the meaning of terms employed in a policy of insurance, 1 Greenl. Ev. sect. 295; 1 Phillips on Ins., arts. 142, 143, 144; and that it is the province of the jury to decide on the meaning of such terms, 2 Ib. arts. 1942, 1947.

AMES, C. J. The first cause for new trial set down in the motion is, that the judge who presided at the trial refused to

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instruct the jury, that the plaintiff, notwithstanding his goods were damaged by a peril insured against, could recover nothing under his policy, if the goods insured brought more, though damaged, in the port of arrival, than they cost when found in the port of shipment; that is, as we understand the request, enough more to make the adventure a profitable one. It is clear that the judge would have fallen into a gross error had he given such instruction. The insurer of goods against damage by the perils of the sea has no right to the mercantile profit of the insured by way of set-off to the sea-damage, any more than he is subject to the mercantile loss of the adventure by way of increase or aggravation of the sea-damage. The instruction asked for would make an indemnity against perils of the seas dependent upon the state of the market at the port of arrival, which is the risk of the merchant, and in no way connected with the perils against which he has obtained the indemnity. The great excellence of the rule for the adjustment of a partial loss, laid down by Lord Mansfield in *Lewis v. Rucker*, 2 Burr. 1167, and established by Mr. Justice Lawrence in *Johnson v. Sheddon*, 2 East, 581, which has prevailed ever since and was applied in this case is, that it yields the same result whether the goods are imported at a profit or a loss. It is, by deducting the gross produce of sales of the damaged goods at the port of arrival from the gross produce of the sales of such goods if they had arrived sound, to ascertain the proportion or percentage of loss in consequence of the damage; as one half, one third, one quarter, or the like; and to take that aliquot part of, or percentage upon, the cost of the goods insured or their value in the policy, as the amount which the insurer is to pay. This rule in application to any state of things, can never be liable to the objection made to it at the argument, that it may subject the insurer to more than the cost of the article, or to its value as agreed in the policy; since it can never be but a proportion of that cost or value, and the precise proportion due to the damage from the perils insured against.

The next ground for new trial alleged is, that the court erred in refusing to instruct the jury as matter of law, that "bar-

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iron," in the clause of the policy enumerating for what subjects of insurance the company should not be liable for a partial loss, included as the same, or at least within the same reason, "bundles of rods." We know no rule of law by which this identity, either in fact or within the spirit of the clause in question, is ascertained. "Bar-iron" is a term of trade, including, it may be, what those out of the trade would not deem to be "bars of iron," and excluding, it may be, what they would. At all events, this is a question of fact; and as such could not properly be decided by the court. If as terms of trade, "bar-iron" and "bundles of rods" meant, in general, different forms of iron, it was certainly not for the court to say that in the clause in question, the one nevertheless included the other, because it was within the same reason. The court, as a matter of law, cannot know that they are within the same reason; and if the judge did, as a matter of fact, he must nevertheless leave it to the jury. But further, if "bar-iron" does not, in the trade, include "bundles of rods," and yet, like "pease" and "corn" in the old cases concerning the common memorandum, they should be deemed the same in this clause, because within the same reason, this, as those cases show, is a good basis for a custom amongst merchants and insurers in the adjustment of losses, to consider and treat them as the same, but no reason, without such custom, why the court should construe them to be the same. The whole matter as to the meaning of these terms, as terms of trade, and in the clause in question, was very properly, as we think, left to the jury.

And this brings us to the question of the admissibility of the testimony of others engaged in the iron trade, than merchants and insurers procuring insurance and insuring in it, to prove the meaning of these terms. We take it that he who insures in a trade, and uses in his policy phrases or terms which have a distinctive trade meaning, is presumed to know, and is bound by that meaning; and we see no reason why any person connected with the trade, whether as a manufacturer, importer, or dealer in any form, so that as something within his line of business, he may reasonably be presumed to know the meaning of the trade terms, is not qualified, as

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an expert, to swear with more or less authority, to their meaning. This is the rule constantly acted upon in the trial of revenue causes in the courts of the United States, where the duty which a particular article shall pay turns upon the distinctive meaning of the articles enumerated in the tariff acts. All who deal in the articles, whether as manufacturers, importing merchants, retailers, or artisans, are admitted to testify to the names used in trade to distinguish them. *Two Hundred Chests of Tea, Smith, Claimant*, 9 Wheat. 439, 440; *Barlow v. The United States*, 7 Peters, 409, 410; *United States v. One Hundred and Twelve Casks of Sugar*, 8 Ib. 277.

It may be, that beside the general trade meaning, certain terms may have acquired, in application to insurance in it, a customary meaning, far more inclusive than the ordinary trade meaning of them; so that, to illustrate by the trade in question, "bar-iron" may include "bundles of rods," or "sheet-iron" may include "boiler-plates," or the like, as in the cases cited on the part of the defendants from Park on Insurance, "corn," in the common memorandum, was construed by custom, to include "pease" and "beans." This may certainly be proved by the custom of adjusting losses under such policies as in those cases it was proved; and can only be proved by persons accustomed to insure, and procure insurance, and to adjust losses under policies upon such subjects. To prove such a custom in the adjustment of losses, the witnesses need not be necessarily persons engaged in the iron trade; but insurers and insurance brokers would be quite as admissible as witnesses, because from their business, quite as likely to be cognizant of the custom, as iron merchants accustomed to procure such policies, and to receive losses under them. Now, as we learn from the allowance of the judge who tried this cause, testimony from the trade, to ascertain the meaning of these disputed terms, as used in the several branches of it, and from insurers and merchants, insuring and procuring insurance on iron, to ascertain the meaning of these terms in the usual or general language of trade and business, was allowed on both sides to pass to the jury. We deem this, to say the least of it, sufficiently liberal to the defendants; and that they

have no cause to complain of the rulings of the court in these particulars.

Had, indeed, the defendants offered evidence of a custom amongst insurers and merchants, in the adjustment of losses under policies on iron, to treat "bundles of rods" as "bar-iron," within the clause of the policy exempting insurers from liability for partial losses on the latter, and having thus laid a sufficient basis for the request, asked the court to instruct the jury, that if they found that notwithstanding the general distinctive meaning of these terms in the trade, they had acquired from such custom, amongst insurers and merchants procuring insurance, an identical meaning, and that in such case the particular meaning so proved, must prevail over the general trade meaning of the terms, the instruction would have been given, or if refused would have been cause for a new trial. We do not understand however, that any such evidence was submitted to the jury, or that any such request was made. The court was, in substance, asked to exclude the testimony of retailers and workers in iron, as to the meaning of "bar-iron" and "bundles of rods," in the trade, and to admit exclusively the testimony of insurers, and merchants procuring insurance on iron, to their understanding of the meaning of "bar-iron" in the clause of the policy in question, as distinguished from a customary meaning attached to the term in the clause *derived from the actual adjustment of losses under it*. We see no propriety in the admission of such testimony at all; and certainly none in the exclusion of testimony to the meaning of the term "bar-iron," as used in the trade, derived from persons engaged in any branch of the trade.

Two questions, one relating to the proof of the extent of the loss, and the other, what extent of loss on "bar-iron" is necessary to subject the defendants, within the meaning of the policy, remain to be considered.

We are asked to set aside the verdict, because the court refused to instruct the jury, that the plaintiff was concluded from claiming any greater partial loss against the defendants than the percentage at which his damage was appraised at the New York custom-house, upon the application of his agent for

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a remission of duties proportioned to the loss sustained; he having accepted the remission of duties in that proportion. We cannot see the ground of such an estoppel; how the defendants have been injured by the plaintiff's acceptance of a remission of duties upon the basis referred to, or upon what principle they can claim, that it conclusively establishes the rule of ascertaining, as against them, the amount of the partial loss under the policy. The most that they can ask from it, is the privilege, which they have probably exercised, of commenting upon it before the jury as an admission of the plaintiff, to be gathered from his conduct, as to the limited degree of the damage done to his property.

The remaining question is, however, clearly with the defendants; and if the jury had not specially found that "bundles of rods" were not "bar-iron," the ruling of the court upon the construction of the clause excepting "bar-iron" from any partial loss, would have entitled the defendants to a new trial. As we construe the clause, "bar-iron," together with the other articles enumerated with it in the first portion of the proviso, is insured against no partial loss whatever; and the court erred in qualifying this first portion of the proviso by the words "unless the same amount to twenty per cent, &c." which qualify exclusively the exception from partial loss of hemp or flax. As the jury have found, however, this error could not have injured the defendants, and cannot be allowed to disturb the verdict.

For these reasons this motion must be overruled, with costs, and judgment rendered on the verdict.

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BENJAMIN SPRAGUE & another v. CHRISTOPHER RHODES & others.

A court of equity will not retain a bill to abate a dam which flows lands of the plaintiffs until the title of the plaintiffs is established at law, after upwards of forty years' user by the defendants of the dam upon payment of compensation, as they aver, under claim of right; but will dismiss the bill with costs.

BILL in equity, filed December 20th, 1855, to abate a dam maintained by the defendants at the outlet of Mashapaug Pond,

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in Cranston, which the bill alleged caused water to flow back upon the lands of the plaintiffs, situated upon the borders of Spectacle Pond, and created a nuisance thereon. The bill stated, that there had not been upon said dam any mill requiring the use of the waterfall as a motive-power for more than twenty years past; and that during many of said years the dam had been open, and the water drawn down to the natural level of said Spectacle Pond; and that, for the time during which the dam had been maintained and the water kept up, a compensation had been paid to the plaintiffs for flowage, by the defendants and those from whom they claim title, until the year 1850, since which time no compensation had been paid. Upon the overruling of the demurrer to this bill, as reported in 4 R. I. Rep. 301, the defendants answered the same, and in their answer set up as defences to the relief prayed by the bill that they, and those from whom they claimed title, had maintained said dam at its present height, under a claim of right, for upwards of forty years before the filing of the bill, paying the defendants and those under whom they claimed, a compensation for the flow upon their lands,—the last payment having been made in 1852, in full of all damages up to the 1st day of August, 1850, and that they had never refused to pay such compensation; the plaintiffs never having demanded it since the last payment, although they agreed to take \$20 as such compensation for the year following said last payment; that from 1809 to 1820, the water-power created by said dam was used to drive a water-mill, built by one William Potter, and situated at the outlet of said pond; and that after that time, when it was conveyed to the defendants, and up to 1829, said mill was run more or less by the owners thereof, when, having become dilapidated, it was removed; but that said dam had been maintained for the purpose of keeping up the pond at its old height, as a reservoir for the use of the Bellefonte mills, situated about a mile and a quarter below said dam, owned by a portion of the defendants, and for the use of the Cunliff mills, situated between said Bellefonte mills and the dam, and owned by others of the defendants;—the rights to said reservoir, since 1820, when they were purchased by the defendants, always having been conveyed, in un-

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divided moieties, as appurtenant to said mills ; and the answer claimed the right of the defendants to keep up said dam, for such purpose, under the mill act of this state. The answer further alleged, that the complainants never denied the right of the defendants to maintain said dam until about the time of the filing of the bill, and never requested them to remove, or cut down, or reduce the same, so as not to flow the lands of the complainants ; that the injury done by such flow is inconsiderable, and that the maintenance of said dam is absolutely essential to the profitable use and operation of the mills of the defendants, as without it, they would have an insufficient supply of water for a large portion of the time ; that since the mill at the outlet had been removed, and before the filing of the bill, " the Cunliff mills have been owned by several different persons and firms, who, as the defendants believe, purchased the same in full confidence and expectation of continuing the use of Mashapaug Pond in connection therewith in the same manner as it had been used before ; that large sums of money have been expended by some of said owners in the improvement of said Cunliff estate, and which, as the defendants believe, would not have been done but for the expectation aforesaid, of all of which the defendants believe the complainants had notice." The defendants further alleged " that they do not know or believe that during the period aforesaid, said Mashapaug dam has ever been open, and the water of the pond drawn down to its natural level, except for the purpose of repairing said dam ; but that they believe that said dam has ever since 1820, if not longer, been maintained at its present height, and said pond always kept up as much as possible for the use of said Bellefonte and Cunliff mills." The answer further claimed, that after so long an enjoyment by the defendants of the use of said pond under a claim of right, upon compensation, and the acquiescence of the complainants therein by accepting compensation for the same, the complainants were not entitled to any relief from a court of equity until they had first established their rights as set up in their bill by a trial at law.

Upon the filing of the replication, proofs were taken on the part of the plaintiffs, tending to prove that the keeping up of

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Mashapaug Pond to the height of the dam, did not increase, all things considered, the water in that pond; since, in some way, when the water was so raised, the water in Spectacle Pond, at but a little distance from it, was also raised, and so, either through subterranean channels of communication, or by diverting the springs which supplied Mashapaug Pond, from that pond to Spectacle Pond, the water passed into the latter pond, which had another outlet; and from that cause, and the greater absorption and evaporation, was lost to the mills of the defendants. The plaintiffs also offered proof tending to show that the damage to their lands by the backing of water upon them was far from inconsiderable, as stated in the answer; and one of the complainants, being produced as a witness on their part, swore that some time between 1831 and 1833, and again in 1837, he disputed, in conversation with William Rhodes, one of the owners of the Bellefonte mills, and in 1852, with one Briggs, then an owner in the Cunliff mills, the right of the defendants to keep up the dam as a reservoir for their mills; and that though he had received compensation for the flowage up to 1850, he never assented to the right claimed, but had offered to Rhodes to refer the right as well as the damage, to Mr. Justice Staples, — Rhodes being willing to refer the damage only.

The defendants relied for proof wholly upon their answer, and the following written admission of the complainants: —

“ The complainants in this cause hereby agree to admit upon the hearing thereof and otherwise as may be necessary, that one William Potter in or about the year 1809, owned the premises at the Mashapaug Pond, in complainants’ bill mentioned as now being owned by the respondents, and erected thereon a water-mill and the dam in question; that said Potter continued to own and run said mill and to maintain said pond until the year 1820, when he sold and conveyed said Mashapaug factory estate, including the land aforesaid and the buildings and improvements thereon, one undivided moiety to the defendants, Christopher Rhodes and others, copartners, under the firm of the Bellefonte Manufacturing Company, and the other moiety to Thomas Sprague of Providence; that said

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Bellefonte company then owned and operated the Bellefonte mill so called, situate in Cranston, about one and three quarters miles below said Mashapaug dam, and upon the same stream, and which mill was at the commencement of this suit, and still is, owned by the defendants, Christopher Rhodes, Robert Rhodes, George C. Arnold, and Phebe Arnold; and that the said Thomas Sprague, at the time of said sale and conveyance, owned and operated another mill, since known as the Cunliff mill, situate upon the same stream between the said Bellefonte and Mashapaug mills, and which said Cunliff estate at the commencement of this suit was, and still is, owned by the defendants, Bowen and Batty; that said Mashapaug mill continued to be run more or less by the owners thereof until the year 1829, when having become dilapidated it was taken down and never since rebuilt, but that said Mashapaug dam was continued to be maintained for the use of said Bellefonte and Cunliff mills; that the one undivided moiety of said Mashapaug estate and privilege belonging to the owners of the Cunliff mill has always been conveyed therewith; that the respondents, and those from whom they claim, have maintained the said dam ever since the same was first erected, as aforesaid, and during all the time the said dam has been kept up for the use of the said several mills as aforesaid, all of which were water-mills, and during the greater portion of the same period the pond has been kept up to its present height for the like use; that since said Mashapaug mill was removed, and before the commencement of this suit, the said Cunliff estate was owned by several different persons and firms; that large sums of money have been expended by some of said owners in the improvement of said Cunliff estate, of which the complainants had notice; that compensation has been paid by the respondents and those from whom they claim, to the complainants for every year that the complainants' land has been flowed, up to the year 1850; that the respondents have never refused to pay for the flowing complained of since that time, although they have neglected so to do; that the complainants have made no demand for said flowage since about the latter part of 1852; that about the 17th of March, 1852,

said Rufus Sprague, for himself and the other owners of said lands, in consideration of \$75 then paid to him, released all claims against said Bellefonte Company for said flowage up to August, 1850, and then agreed to release all claims for said flowage for one year from August 1st, 1850, to August 1st, 1851, upon payment of \$20."

Bradley and Metcalf, for the complainants, cited *Digest*, 1844, p. 204, to the point that the dam of the defendants was not within the mill acts a reservoir, as they contended, not being a mill-pond, within the meaning of that act; and *Jordan v. Woodward*, 40 Maine, 317, to the rule of construction of mill acts. To the point that the injury, caused by the flow of the dam, to the lands of the complainants, was a nuisance which the court could enjoin, they cited *Sprague v. Rhodes*, 4 R. I. Rep. 301; and to the point of the abandonment of the mill-dam by the defendants, relied upon by them, *Baird v. Hunter*, 12 Pick. 556.

Matthewson, for the respondents:—

1st. The flowing complained of is authorized by statute, and that, although the pond is used as a reservoir only. *Digest*, 1822, p. 374; *Ib.* 1844, p. 205; *Wolcott Manuf. Co. v. Upham*, 5 Pick. 292; *Bradley v. Rice*, 1 Shep. 198; *Nelson v. Butterfield*, 8 Shep. 220.

2d. The right to raise the pond for the Mashapaug mill having been once acquired, the owners of that mill had the right to continue the pond for the use of other mills, after that mill was abandoned. *Angell, Watercourses*, §§ 227, 228.

3d. The acquiescence of the complainants for the length of time and in the manner disclosed by the case, and the consequent improvements made by the respondents, are in themselves sufficient to preclude the plaintiffs from the aid of the court. *Sprague v. Steere*, 1 R. I. 247; *Sprague v. Rhodes*, 4 *Ib.* 302; *Birmingham Canal Co. v. Lloyd*, 18 Ves. 515.

4th. Twenty years' uninterrupted enjoyment of the use of water in a particular manner is a conclusive presumption of right. Here no interruption is shown. 4 *Mason*, 402; 6 *East*, 215; 16 *Pick.* 241.

5th. The injury complained of not being irreparable, but trivial and capable of compensation, the plaintiffs are not entitled to the interposition of the court. 2 *Story Eq.* § 925; *White v. Co-*

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hen, 19 Eng. L. & Eq. 149; *Wood v. Sutcliffe*, 8 Eng. L. & Eq. 222; *Attorney-General v. Sheffield Gas Co.* 19 Eng. L. & Eq. 643, 650; *Van Winkle v. Curtis*, 2 Greene's Ch. 422.

6th. The question of nuisance being in dispute, the complainants have no right to come into equity for relief, until that shall have been tried at law. *Ingraham v. Dunnell*, 5 Met. 119; *Soltan v. DeHeld*, 11 Eng. L. & Eq. R. 104, 117; *Potter v. Whitham*, 5 Shep. 292; *Sprague v. Rhodes*, *supra*.

AMES, C. J. It is evident that this case is not one for the specific action invoked by the bill. The right of the plaintiffs, so far from being clear from what has been disclosed at the hearing, is embarrassed in the first place by the question under our mill act. This, it is true, we might, as incidental to the relief, decide; but then, again, the title is rendered, at the very least, doubtful, by the mixed question of law and fact which the case raises, to wit: whether the defendants have not, by the adverse enjoyment of themselves and of those under whom they claim for upwards of twenty years under a claim of right, gained a title, as against the plaintiffs, to keep up this dam for the use of their mills, upon paying a reasonable compensation for flowage. These are questions for a court of law; and the last peculiarly so; not only from its exclusively legal character, but from the kind of proof which it involves, proper to be submitted only to a jury.

No doubt a court of equity may, when it finds the plaintiff's title embarrassed by mixed questions of law and fact, retain the bill, and give the plaintiff liberty to bring an action at law or make up issues at law, fitted to resolve those questions. But in a case like this, where the title of the plaintiffs, doubtful under the statute at best, has been suffered by them to be weighed down by upwards of twenty years' user of the defendants, which, so far as we can see, was adverse, the proper course of the plaintiffs was, before filing their bill, to have asserted their title at law; and afterwards, if there successful, to come here for redress against a continued resistance to their established legal rights.

There is no reason apparent for their coming into this court, in the first instance, such as there would be if they were suffering an irreparable mischief, which demanded the interposition of the court, pending the litigation at law; or, if they required the

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aid of the court to insure them, by way of condition upon the other party in the matter of proofs; or by discovery, a fair trial at law. Nothing of this sort is even pretended; but it is the bald case of plaintiffs coming into this court to abate a mill-dam, or the dam of a reservoir for the use of mills, on account of the flowage of land caused thereby, when they have accepted compensation for the flowage from 1809 to 1850; the dam having been kept up as a mere reservoir dam at least from 1832 to the filing of this bill in 1855, notwithstanding as one of the plaintiffs swears he disputed the right of the defendants to maintain it. It is singular, if the right were really contested by him, that he did not, in all this course of time, contest it in the effectual form of an action at law, by which it might have been settled for or against him! And during the three years and upwards that this bill has been pending, it is again singular that no application has been made to the court by the plaintiffs, for liberty to bring an action at law to establish their title.

In the leading case upon this subject of *Jones v. Bacon*, 4 M. & C. 433; s. c. 18 Eng. Cond. Ch. R. 432, Lord Cottenham says, that he could "find no case in which the court has thought it right to retain a bill, simply for the purpose of enabling a plaintiff to do that," that is, to bring an action at law to settle his title, "which these plaintiffs might have done at any time during the last four years;" referring to the period of time which had elapsed since the plaintiffs knew of what they claimed to be an infringement of their right. But what should be said of retaining a bill until the right was settled at law, after a delay of the plaintiff to bring an action for upwards of twenty-six years since he obtained such knowledge? What should be said of a delay to sue so protracted, and an adverse user on the other side so long continued, that it has become a grave question at least, whether the user has not ripened into a right? Under such circumstances, we can give no relief upon this bill, nor find any precedent for retaining it until the title of the plaintiffs is settled at law; and as upon this ground the bill must be dismissed with costs, we purposely abstain from touching upon the matters of law and fact concerning the title, as well as upon the ground of equitable estoppel set up in the answer.

Bill dismissed with costs.

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**LAWRENCE FITZPATRICK & others v. MICHAEL FITZPATRICK
& others.**

The minutes of the testimony of a witness, taken by a judge in the course of a trial before him, are competent as evidence in another case to which the witness is a party, of an admission made by the witness in his testimony, when such minutes are accompanied by the testimony of the judge that they were so taken, and that he believes them to be correct; although he also swears that he has no recollection of the testimony of the witness; and that the minutes do not recall the testimony to his memory.

An advertisement, giving notice of a mortgagee's sale under a power contained in the mortgage, is sufficient, although not signed by the mortgagee, and although the mortgaged premises to be sold are described in it no more particularly, than as "situated in the northerly part of the city of Providence, being the lot of land No. 10 (ten) on the plat of the land of S. W., surveyed and platted by H. F. W., July 7, 1845," provided the plat be recorded.

Where a deed is so defectively executed under a power contained in a mortgage as to be void, and is followed by a quitclaim deed of the title, executed by the grantee to the mortgagee who sold under the power, the former deed may, by consent of parties, be corrected by interlineations, and both deeds being reacknowledged and recorded afresh as of a subsequent date, may be presumed to be redelivered as of the new date, so as to take effect from their redelivery.

A defendant in trespass and ejectment cannot, at least under ordinary pleas to the maintenance of the action, protect his possession by setting up an outstanding mortgage of the ancestor of the plaintiff purchased in by the defendant pending the action; nor by setting up such a mortgage discharged of record before the commencement of the action, but assigned to him pending the action; although he proves that the mortgage was purchased by him before the action and discharged by mistake of the mortgagee, and the assignment recites the purchase and mistake.

Where the title produced by a plaintiff in an action of trespass and ejectment is fatally defective for a cause not noticed or objected by the defendant at the trial, the court may, nevertheless, grant to the defendant a new trial, on the ground of such defect, provided it is apparent that the defect, if objected at the trial, could not have been remedied by further proof on the part of the plaintiff.

TRESPASS and ejectment to recover the possession of a lot of land in the north part of the city of Providence, being lot No. 10, on a plat of land of Samuel Whelden, made July 7, 1845.

Pleas, the general issue, and soil and freehold in the defendants; and, again, in the defendant, Edward Fitzpatrick, and that by his license, the other defendants entered, and joinder.

At the trial before the chief justice, with a jury, it appeared that the plaintiffs, who were infants, claimed title to the lot in question, as the children and sole heirs at law of one Martin Fitzpatrick; that the lot was formerly the property of one Wil-

liam Donnelly, by whom, on the 23d day of August, 1849, it was mortgaged to the defendant, Edward Fitzpatrick, to secure the sum of \$456, payable on or before the 23d day of February, 1850, with power of sale to the said Edward, his heirs, executors, administrators, and assigns, for the payment of said sum with interest and expenses of sale, in the event that the mortgage money should remain unpaid after said 23d day of February, 1850; he or they "first giving three months' notice of such sale, and of an adjourned sale, two weeks, in some public newspaper, in said Providence." To prove the assignment of said mortgage, by Edward Fitzpatrick, to their father, Martin Fitzpatrick, the plaintiffs submitted evidence, tending to prove, that the original assignment of the mortgage was formerly in the possession of Martin, and was kept in a trunk in which were his clothes and all his papers, to which Edward, being in the same house, had free access, which assignment was now missing; and claiming that Edward had taken it, and now had it, in the possession of his counsel, in court, called upon the counsel to produce it; which being refused, they offered as secondary proof of the same, a certified copy of the instrument from the registry of deeds in Providence, together with the testimony of Hon. William R. Staples, late chief justice of the supreme court, to his minutes of the sworn admission of Edward, taken on the trial before him of certain proceedings in forcible entry and detainer instituted by said Martin against said Donnelly for the possession of the premises, from which it appeared, that said Edward, as a witness, swore that he had assigned said mortgage to Martin and received from him a consideration therefor. Judge Staples produced the minutes in his handwriting; but stating, that he did not recollect the testimony at all, even after reading his minutes, but that they were the minutes taken by him as judge presiding at the trial, and that he presumed they were correct, his minutes and testimony were objected to, on the part of the defendants, as proof of Edward Fitzpatrick's admission that he assigned said mortgage to Martin, and, notwithstanding said objection, were allowed by the court to pass to the jury. In further proof of their title, and that Martin Fitzpatrick, after the day of payment in said mort-

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gage, sold the lot in question under the power of sale contained therein to one John Doran, who reconveyed the same to Martin, the plaintiffs first offered evidence tending to prove, that said Martin advertised, in the "Providence Journal," for the length of time required by the power, the sale of the mortgaged premises, and produced the files of that paper, with accompanying proof, from which it appeared, that for the requisite length of time the following advertisement was inserted in that paper:—

"Mortgagee's Sale.

"Will be sold by public auction on Friday, April 19, 1850, by virtue of a power of sale contained in a deed of mortgage, made and executed by William Donnelly, Aug. 23, 1849, a certain lot of land, with the buildings and improvements thereon situate, in the northerly part of the city of Providence; being the lot of land, numbered (10) ten, on a plat of the land of Samuel Whelden, surveyed and platted by H. F. Walling, July 7, 1845. By order of the mortgagee."

The admission of this evidence of the execution of the power was objected to on the part of the defendants, on the ground, that the notice of sale, above advertised, described the estate sold, only by reference to a plat, and did not state to whom the mortgage was executed. It appearing, however, that the plat as well as the mortgage were recorded in the registry of deeds and plats in the city clerk's office, in Providence, the objection was overruled, and the evidence was admitted to pass to the jury.

The plaintiffs then submitted proof, that on the 19th day of April, 1850, the lot was sold, under the power, at public auction, to John Doran, as the highest bidder therefor, for the sum of \$520, and in further evidence of their title offered two deeds, one, from William Donnelly, executed by Martin Fitzpatrick, as his attorney, bearing date April 19, 1850, and first acknowledged before the city clerk on the 22d of April, 1850, which recited Donnelly's mortgage, the power of sale, non-payment of the mortgage money, and sale, and conveyed the lot to Doran, in fee; and the other, a quitclaim deed from Doran to Martin Fitzpatrick, of the same premises, and dated, and first acknowl-

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edged, on the same days, as the deed from Donnelly to Doran. It appeared from inspection of the first of these deeds, coupled with the testimony of the city clerk, who witnessed and acknowledged it, that when first executed and acknowledged it ran in the name, and purported to be the deed of Martin Fitzpatrick, as "the present mortgagee of the aforesaid mortgage deed," (meaning Donnelly's mortgage to Edward Fitzpatrick,) "by virtue of an assignment, recorded, &c." though signed by Martin Fitzpatrick as attorney for Donnelly; and that afterwards, on the 2d day of May, 1850, it was altered, by interlining the words "William Donnelly, by my attorney," between the words "J." and "Martin Fitzpatrick," in the body of the deed, and in other respects mentioned below, leaving the signature and date to stand, and was then reacknowledged before, and recorded afresh by the city clerk; his certificate, as follows, under the old one, being upon it: —

"Providence, ss. In city of Providence, May 2, 1850, came Martin Fitzpatrick, and acknowledged the foregoing instrument, as altered by adding, "and whereas said Donnelly appointed said Edward his attorney, with power to sell, and whereas said Edward assigned the mortgage aforesaid to Martin Fitzpatrick on the first day of October, A. D. 1849," and also, "William Donnelly, by my attorney," to be his free act and deed.

"Before me, ALBERT PABODIE, City Clerk."

On the same day, as appeared by the certificate on the deed, and oath of the city clerk, the deed from Doran to Martin Fitzpatrick was acknowledged by Doran again, and recorded afresh.

Upon this proof of title, the judge presiding at the trial, against the objection of the defendants, allowed the deeds to pass to the jury as sufficient *prima facie* evidence of title in the plaintiffs, and thereupon the plaintiffs rested their case.

To maintain the issues on their part, the defendants offered in evidence a mortgage deed of the premises of a date prior to the mortgage under which the plaintiffs claimed, but assigned

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to the defendant, Edward Fitzpatrick, after the commencement of this suit, which, being objected to by the plaintiffs, the presiding judge refused to allow to pass to the jury to protect the possession of the defendants.

To maintain the issues, on their part, the defendants then offered in evidence a mortgage deed of the premises, made by Martin Fitzpatrick to William G. R. Mowry and Clarke Steere, copartners, under the style of Mowry & Steere, and an assignment thereof to the defendant, Edward Fitzpatrick, executed, and bearing date, after the commencement of this suit, but which assignment recited, that the mortgage had been really purchased by said Edward of said Mowry & Steere, for full value, prior to the commencement of this suit, to wit, on the 8th day of January, 1855. On the margin of the record of this mortgage, in the book in which it was registered in the city clerk's office, it was agreed, however, was the following writing:—

“ Having received payment in full for the note within named, we do hereby cancel and discharge this mortgage deed. Witness our hand and seal, January 8th, 1855.

(Signed)

“ MOWRY & STEERE, (L. S.)

“ By WM. G. R. MOWRY, (L. S.)”

“ In presence of

“ ALBERT PABODIE.”

The said assignment of said mortgage also recited that this writing on the margin of the record had been made by mistake; and the defendants offered to prove, in connection with said mortgage and assignment the facts recited in said assignment, to wit, that said Edward Fitzpatrick did out of his own proper moneys, on said 8th day of January, 1855, pay to said Mowry & Steere the full value of said mortgage debt, and thereby, had then actually purchased said mortgage of them, and that said writing on the margin of the record of said mortgage had been made by mistake and error of said Mowry & Steere, and that neither said Martin Fitzpatrick, under whom the plaintiffs claim, nor any one for him, had paid said mortgage debt, or

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any part thereof. The presiding judge, upon the objection of the plaintiffs, refused to allow said testimony, or said mortgage and transfer to pass to the jury, as evidence of title on the part of the defendants.

The jury having found the several issues for the plaintiffs, and the defendants having duly excepted to the several rulings above of the judge presiding at the trial, now moved for a new trial on the ground of errors in law in said rulings.

James Tillinghast, for the motion : —

1st. The notes of Judge Staples should not have been received in evidence. It was not the testimony of William R. Staples, swearing from memory, refreshed by the memoranda to facts that had once been within his knowledge that went before the jury, but it was the paper, as the official notes of Judge Staples of the testimony of a witness at a former trial, mere hearsay, that was allowed to pass. This should not have been. The rule has never been extended to include these, especially where the witness is living and within the jurisdiction. *Miles v. O'Hara*, 4 Binney, 108; *Foster v. Shaw*, 7 Serg. & Rawle, 156 (162); *Lightner v. Wike*, 4 Ib. 203; *Lawrence v. Barker*, 5 Wend. 301; *Greene v. Brown*, 3 Barb. (Sup. Co.) 119. Even had the witness deceased, these notes would not have been admissible. They were not sufficiently established, and were in another case, with different parties and issues. *Wolf v. Wyeth*, 11 Serg. & Rawle, 149; 1 Greenl. Ev. § 163, &c. and note; *Watson v. Gridley*, 11 Serg. & Rawle, 337; *Warren v. Nichols*, 6 Met. 261.

2d. This advertisement is defective and not sufficient under the power, and the sale thereunder was consequently void. These powers are limitations upon the right to redeem and are not favored, but are to be strictly construed and followed. *Hill on Trustees*, 478; 1 Sugden on Powers, 252, 253; 1 Hilliard on Mortgages, 97, § 15-91, § 2; *Gibson v. Jones*, 5 Leigh, 370, as cited in 2 U. S. Eq. Digest, 363, § 1496; *Ormsby v. Tarascon*, 3 Litt. 404; 2 U. S. Eq. Digest, § 1498-9. No place or time of sale is given. *Burnet et al. v. Denniston*, 5 Johns. Chan. 35. The advertisement is signed by no one, and no information given in it by which any one interested could know where, or to

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whom to apply to redeem, or acquire information concerning the mortgage, the amount due, &c. The only reference is by order of the mortgagee, when in fact the sale was by an assignee of the mortgagee. The sale being void for above defect in the notice, no title passed by it, and consequently, the legal title and right of action, if any, is in the administrator of Martin Fitzpatrick, and not in the plaintiffs his heirs. It is well settled, that plaintiffs in ejectment must recover on the strength of their own title, and that a defendant in possession, without title, may show that the plaintiff has no title, or that it has failed or passed out of him. *Jackson v. Rowland*, 6 Wend. 666.

3d. The mortgagee's deed, as first executed, was a nullity; or if not, it was cancelled by the alterations, and the title under it did not vest in Doran until the time of the second acknowledgment, which was after Doran's deed to Martin Fitzpatrick. *Clason v. Corley*, 5 Sand. (Sup. Co.) 447; 13 U. S. Dig. 491, §§ 142, 143. And Doran's deed being a mere quitclaim deed, with limited covenants, no after-acquired title passed by it. *Blanchard v. Brooks*, 12 Pick. 49; *Comstock v. Smith*, 13 Ib. 116; *Wight v. Shaw*, 5 Cush. 56; *Miller v. Ewing*, 6 Ib. 34.

4th. The title acquired under the mortgage to Stephen Martin should have been received in evidence to protect the defendant's possession. *Jackson v. Smith*, 13 Johns. 408; *Tucker v. Keeler*, 4 Vermont, 161 (as cited 2 U. S. Dig. 136, § 427); *Munsel v. Sanford*, 1 Root, 257, (Ib. 138, § 473).

5th. The title acquired under this mortgage should have been received in evidence. The title when acquired related back to this suit. In fact, the title vested before this suit; for the mere payment of the money passed the mortgage. *Jackson v. Ramsay*, 3 Cowen, 75. The receipt upon the margin of the record is a mere receipt, and open to explanation, to show it was a mistake, especially as against the plaintiffs, who are merely volunteers in the estate under the original mortgagee, and cannot, like a purchaser for value, set up the record discharge. *Bell v. Woodward*, 34 N. Hamp. 90; *Fleming v. Tany*, 12 Harris, 47.

Currey, against the motion :—

1st. The evidence of the record of the paper mentioned was rightly admitted. Its admission is sustained by the cases, *State v. Gordon*, 1 R. I. Rep. 191, 192; and *State v. Colwell*, 3 Ib. 132. The paper was admissible, on its recognition by the witness of its genuineness, as his official notes. 1 Greenl. § 437 and note.

2d. The references in the advertisement of sale to the registration of both the mortgage and of the plat, made the description of the premises sufficient.

3d. That the re-acknowledgment and redelivery of these deeds would operate as an execution and delivery *de novo*, and relate back to their dates, would seem to be a proposition too obvious in the law to need any argument.

4th. The ruling objected to here is sustainable upon every principle; since in trespass and ejectment, whether under the plea of not guilty or of soil and freehold, the issue looks only to the title at and before the commencement of the action.

5th. The evidence of the Mowry mortgage was rightly rejected, as the mistake mentioned, if any there was, could be corrected only in a court of equity. Rev. Stats. ch. 149, § 8.

AMES, C. J. The first ground for new trial, set down in this motion, that the judge presiding at the trial admitted the minutes taken by Judge Staples when trying a case, of the testimony of one of the defendants, for the purpose of proving that defendant's admission, is clearly untenable. The objection made to the admissibility of this evidence, is, that the judge could not *recollect* the testimony independent of his minutes, nor refresh his memory with them of what the testimony was, but could merely swear that they were taken by him, as judge, in the course of the trial of a case before him, and that he believed them to be correct. Such minutes are taken by every judge in our supreme court and court of common pleas, as a necessary part of his official duty in the trial of causes; in order, not only to enable him to instruct the jury in the law applicable to the facts, which by law he must do, or to sum up the evidence to the jury, which by law he may do, but to enable him to allow grounds for new trial, founded upon the evidence, under the rules, and bills of exceptions, under the requirement of the

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statute. Numerous as trials, and, consequently, voluminous as such minutes must necessarily be, to apply to them the strictest rule that can be found with regard to the voluntary exceptional memorandum of an ordinary witness, would be to banish them as a source of evidence for the numerous and important purposes, in the administration of justice, for which they are needed ; since no judge, unless possessed of a superhuman memory, could, in general, truly testify further than Judge Staples testified in this case, that these were his minutes of what took place before him, written by him at the time, and that he believed them to be correct. We think that the fair presumption, decidedly, is, that they are correct ; and that if rules of evidence are designed to elicit, and not to obstruct the passage of truth to a jury, they ought to be admitted, as evidence, with such verification of them as, in the nature of things, is possible. It would be quite easy to hunt up cases which would justify the admissibility of the ordinary memoranda of a witness, unofficially taken to refresh his memory, upon quite as slight a basis of recollection as existed in the case before us. References to some of them may be found in 1 Greenl. Ev. § 437, n. 3. But such minutes as these stand, and are admissible as evidence, upon their own peculiar grounds. They occupy a place midway between official records and ordinary unofficial memoranda ; and are the highest kind of minutes, or entries, as in relation to accounts they are called, made in the course of business. The distinction between memoranda or entries of facts, and memoranda of what is said, adverted to at the argument, has no application to them ; since it is the official duty of the judge, because necessary to enable him properly to perform the duties of his office, to take minutes of what is said by witnesses, in giving their testimony. With every guaranty for their general correctness, which official position and duty, and even necessity, that they may answer their immediate purposes, can throw about them, it would be strange, indeed, if they were not receivable in evidence, subject to contradiction, of course, without other confirmation than the testimony of the judge as to the occasion on which he took them, and that he believes them to be correct. See *Rex v. Whitehead*, 1 Car. & Payne, 67 ;

Miles v. O'Hara, 4 Binn. 110, 111; *Eastman v. Cooper*, 15 Pick. 287.

The second ground for new trial alleged in the motion, this court has before had occasion to consider in the analogous case of the advertisement by a sheriff of a sale under the levy of an execution on real estate; *Childs v. Ballou*, 5 R. I. Rep. 537; and we see no reason, either upon principle or authority, to doubt the correctness of what is there intimated, that, in such a notice, given to call together purchasers, and to enable them to ascertain, with certainty, what is offered for sale, a description of the premises to be sold, by reference to a plat or deed on record, is sufficient. Any description which can be given will be unintelligible to one unacquainted with the locality, and the more precise, the more unintelligible; and the description of the premises in this notice, to wit, "a lot of land, with the buildings and improvements thereon, situated in the northerly part of the city of Providence, being the lot of land numbered (10) ten on the plat of the land of Samuel Whelden, surveyed and platted by H. F. Walling, July 7th, 1845"; which plat, it is agreed, as well as the mortgage under which the sale was made was recorded, is quite as intelligible to purchasers, as any that can be imagined.

The only other objection to this notice of sale taken at the trial, to wit, that it was not signed by the mortgagee, is equally untenable. The power authorized, nay required, that it should be given by the assignee who might sell under it; and to answer the only purpose of it, in calling together purchasers, it was equally effective whether signed by the mortgagee or not.

The *third* ground for new trial is, in substance, that after the delivery by Martin Fitzpatrick of his deed to Doran, and Doran's delivery of his deed of quitclaim to Martin Fitzpatrick, which took place on the 19th day of April, 1850, it was discovered that the deed by Fitzpatrick under the power, ran in his own name, instead of that of his principal, Donnelly; whereupon the parties, on the 2d day of May following, came before the city clerk, who was the witness to both deeds, and corrected the error in the first deed by interlineations, and then reacknowledged both deeds, and had both recorded by the city clerk anew,

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and as of the date of May 2d. What more complete proof of the redelivery of both deeds can be given? It is old law that "as a deed may be delivered by words without deeds, so may it also be delivered by deeds without words"; the matter depending upon the intent of the parties. Sheppard's Touchstone, 58, and note 3. It is true that, "regularly, there may not be two deliveries of a deed; for where the first delivery doth take any effect at all, the second delivery is void;" but we are also informed in the same sentence that if the deed, as first delivered, is merely void, or doth become void by matter *ex post facto*, and the party deliver it again, "by this means the deed is become good again." Ibid. 60. Now, in the case before us the deeds were either good to pass the title as first delivered, or they were not. If they were, the title passed by the first delivery; and if not, by the second; and so, *quacunqve via*, the title passed. It is evident that this ground for new trial wholly fails.

The remaining ground for this motion, that the judge presiding at the trial refused to allow the defendants to protect themselves against the action, by setting up outstanding mortgages made by the father of the plaintiffs, and purchased in by one of the defendants after the commencement of the suit, can find no support, either in principle or respectable authority.

In a real action, like our action of trespass and ejectment, the pleas of not guilty, and of soil and freehold, look to the state of things at or before the commencement of the action; and if matter of discharge accrue to the defendant pending the action, as from the plaintiff's release, or the like, it must be pleaded to the "further maintenance of the action," if it has arisen after suit, but before plea or continuance; and *puis darrein continuance*, if after plea or issue joined. *Evans v. Prosser*, 3 T. R. 186; *Le Bret v. Papillon*, 4 East, 502. In the courts of Massachusetts, a mortgage of the ancestor of the demandant, acquired pending a writ of entry, cannot be set up by the tenant to support a title defective at the commencement of the writ, even though pleaded *puis darrein continuance*. *Curtis v. Francis*, 9 Cush. 428, 443, 444.

Nor was this species of defence aided in case of the mortgage to Mowry and Steere assigned to one of the defendants after the commencement of the suit, by the proof offered, that in fact the

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mortgage was purchased by the defendant some three years before the commencement of the action, but, by mistake at the time of purchase, was discharged upon the record, instead of being assigned. By the express words of chapter 149, section 8, of the Revised Statutes, it is enacted, that a discharge so made, "shall forever afterwards discharge, defeat, and release such mortgage, *and perpetually bar all actions to be brought thereupon in any court.*" Nothing can be stronger than these words to show that by such a discharge the legal title under the mortgage was discharged, and, at all events, never vested in the defendant until after the commencement of the action. Under the pleas, the question was merely as to the place of this title, whether in the plaintiffs or defendants, at the commencement of the suit; and whilst, on the one hand, we know of no power in a court of law, upon the plainest proof, to reform the deeds and documents executed by mistake, so as to make them conform to the true intent of the parties, we do not see how, if they could, it would help the case of defendants, unless they could also make *their* act of reformation, or that of the parties, done pending the suit, relate back and take effect, as of a time anterior to its commencement. For these reasons, this motion must be refused upon all the questions raised at the trial.

As a general rule, no other than such questions can be considered upon such a motion; but where the facts, as allowed by the judge and conceded by both parties, show a fatal defect in the title of the plaintiffs, now relied upon in defence, and which if noticed at the trial could not have been obviated by further proof on the part of the plaintiffs, courts have felt authorized to consider the point as still open, upon such a motion as this, and to dispose of the case in such a manner as justice would seem to require. *Slater & another v. Rawson*, 1 Metc. 450-458; and see *Maynard v. Hunt*, 5 Pick. 240-243.

Now such a point, which in the hurry of the trial and the sudden introduction of the evidence, escaped the attention of the counsel for the defendants at the trial, has now been brought to our notice. The notice of the sale under Donnelly's mortgage, of which an advertisement for the period of three months prior to the sale, in some public newspaper,

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printed in Providence, is required, as a preliminary to a sale under the power, is, upon inspection, found defective in the indispensable requisites of naming the *time*, to wit, the hour of the day, and the *place* of the sale. Such a defect defeats the whole purpose of the notice, which, as we view it, is to bring together such a body of purchasers, as by fair competition, will insure, as far as this goes, a full price for the subject of sale. Where, as in such a case, the question is simply whether the power be well executed or not, the question is merely one at law; and so far from being, as argued by the counsel for the plaintiffs, a question in equity only, if there is nothing more in the case, a bill in equity to set aside the execution of the power cannot be maintained. *Tichburn v. Leigh*, 6 Vin. Abr. 365, pl. 11; 2 Sugden on Powers, ch. 11, § 1, art. 13, p. 180.

This defect appears in the only proof brought into the case by the plaintiffs to show the manner in which, as the attorney of Donnelly, Martin Fitzpatrick executed the power of sale contained in the mortgage assigned to him, and this proof, so far as has been disclosed, is the only proof upon that subject. It is fatal to the plaintiffs' title; since, if the power was not well executed the mortgage still remains, and the action for the recovery of the mortgaged premises should have been brought by the personal representative of Martin Fitzpatrick, instead of by his heirs.

For this cause the verdict must be set aside, and a new trial granted.

STATE v. ASA A. PLASTRIDGE.

Where a statute punishes the keeping and maintaining of a grog-shop and tippling-shop, or building, place, or tenement used for the sale or keeping of intoxicating liquors, or where intemperate, idle, noisy or disorderly persons are in the habit of resorting, as a common nuisance, an indictment upon the statute may charge the offence in the language of the statute, to have been committed in both these modes, and proof that it was committed in either mode will maintain the indictment.

THIS was an indictment against the defendant, in two counts, charging him with keeping and maintaining a common nuisance, in violation of chapter 73 of the Revised Statutes.

6	76
11	418
12	217
13	315
13	663
6	76
30	493

The *first* count charged that the defendant "on the 17th day of March, in the year of our Lord, one thousand eight hundred and fifty-seven, and on divers other days and times, between said last-mentioned day and the day of the finding of this indictment, with force and arms, at Providence, in the aforesaid county of Providence, did keep and maintain a certain common nuisance, to wit, a grog-shop and tippling-shop, and building, place, and tenement, used for the illegal sale and keeping of intoxicating liquors, and for the habitual resort of intemperate, idle, dissolute, noisy, and disorderly persons, against the form of the statute in such case made and provided, and against the peace and dignity of the state."

The *second* count charged that the defendant, on the same day and year, at said Providence, "and on divers other days and times between said last-mentioned day and the day of the finding of this indictment, with force and arms," "did keep and maintain a certain grog-shop and tippling-shop, and building, place, and tenement, used for the illegal sale and keeping of intoxicating liquors, and for the habitual resort of intemperate, idle, dissolute, noisy, and disorderly persons, to the great damage and common nuisance of all the good citizens of this state, against the form of the statute, &c."

At the trial of the indictment, before *Shearman*, Justice, at the December term of the court of common pleas for the county of Providence, 1858, the counsel for the defendant requested the court to charge the jury, that the indictment did not charge the commission of any offence provided for in the 73d chapter of the Revised Statutes, but did in substance charge the common-law offence of keeping and maintaining a common nuisance, viz: a grog-shop, tippling-shop, and building, place, and tenement, used for the illegal sale and keeping of intoxicating liquors, and where intemperate, idle, dissolute, noisy, and disorderly persons were in the habit of resorting; and that, in order to convict the defendant, it was necessary for the government to prove — 1st. That the building, place, or tenement was used for the illegal sale or keeping of intoxicating liquors; 2d. That intemperate, idle, dissolute, noisy, or disorderly persons were in the habit of resorting there; and,

3d. That said place was kept by the defendant for such purposes.

The court refused to give these instructions, but, on the contrary, instructed the jury that the indictment sufficiently described an offence under said chapter; that it was immaterial whether it did, or did not, charge the commission of such common-law offence, inasmuch as it did sufficiently charge an offence under said chapter; and that in order to conviction, it was unnecessary for the government to prove all that the counsel for the defendant required, but that if the testimony showed either that intoxicating liquors were illegally sold or kept in the place charged, or, that it was a place where intemperate, idle, dissolute, noisy, or disorderly persons were in the habit of resorting, and that said place was kept by the defendant for either of those purposes, it would be sufficient to maintain the indictment.

The counsel for the defendant also requested the court to charge the jury, that in order to convict the defendant, the facts proven by the testimony and relied upon by the government must be of such a character, that their existence could not be reasonably reconciled with any other hypothesis than that of the guilt of the defendant.

The court assented to this request, and charged the jury, "that if the testimony in the case was as consistent with the defendant's innocence as with his guilt, they must acquit, and otherwise, they need not; and that if there was any reasonable doubt in regard to the guilt of the defendant, upon the whole evidence, he was entitled to an acquittal."

The defendant having duly excepted at the trial to these refusals to instruct and instructions, and a verdict of guilty having been returned against him in the court of common pleas, now brought his exceptions to this court for a new trial, upon the ground of misdirection in matter of law.

Brownell, for the defendant:—

1st. The indictment does not charge the commission of any offence mentioned in chapter 73 of the Revised Statutes. The first section of that chapter declares certain places, kept or maintained in certain ways, to be common nuisances. The offence

provided for is the keeping or maintaining of a common nuisance, and this may be done in as many different ways as there are places described. There are as many different nuisances mentioned as there are places. The keeping and maintaining of each particular place or nuisance is a separate and distinct offence. A place kept for all the purposes and in all the ways set forth in the section is not a statute nuisance, whatever it may have been at common law.

2d. The indictment *does* charge the commission of an offence known to the common law, viz : the keeping and maintaining a common nuisance. It charges the keeping and maintaining of *one* place *only*. That place was a place where intoxicating liquors were illegally sold and kept, and where intemperate, idle, dissolute, noisy, and disorderly persons were in the habit of resorting. A grog-shop is "a shop where grog and other spirituous liquors are retailed." Web. Dic. "grog-shop." A tippling-shop or house is "a house in which liquors are sold in drams or small quantities, and where persons are *accustomed to spend their time* and money in *excessive drinking*." Web. Dic. "tippling-shop." Then a grog-shop and tippling-shop is a place "where grog and other spirituous liquors are retailed," and "where persons are accustomed to spend their time and money in excessive drinking." In this state, then, where it is illegal to retail liquors, the phrase "a grog-shop and tippling-shop," and the phrase "building, place, and tenement used for the illegal sale and keeping of intoxicating liquors, and for the habitual resort of intemperate, idle, dissolute, noisy, and disorderly persons," are convertible terms, describing the same place, and expressing the same idea.

3d. The evidence, in order to support the charge in the indictment, therefore, should have shown that the place, alleged to have been kept, was a place where intoxicating liquors were illegally sold and kept, and where intemperate, idle, dissolute, noisy, and disorderly persons were in the habit of resorting. The offence charged is that of keeping a common nuisance; but that charge, of itself, without describing the kind of nuisance, would be void for uncertainty. It was therefore necessary to describe the kind of nuisance alleged to have been kept.

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The description of the nuisance is therefore *material*, and the words used for that purpose constitute the *descriptive averments* in setting forth the offence in the several counts of the indictment. "No allegation, whether it be necessary or unnecessary, whether it be more or less particular, which is descriptive of the identity of that which is legally essential to the charge in the indictment, can ever be rejected as surplusage." *United States v. Howard*, (Story, J.) 3 Sumn. 15, 16; "which is tantamount to saying that it must be proved as laid." *State v. Fitzpatrick*, 4 R. I. (1 Ames,) 274; *State v. Copp*, 15 N. H. 216; *State v. Noble*, 15 Maine, (3 Shep.) 476; 2 Russ. on Cr. 788. Even if the phrases above mentioned are not convertible terms, still they stand as descriptive of the place charged to have been a common nuisance, and in each case something more than mere proof of an illegal sale or keeping of liquors is essential to support the charge.

4th. The request made by defendant's counsel, as set forth in the fourth exception was correct, and should have been granted by the court. Although not in so many words refused, it was in substance denied. The charge as actually given by the court was erroneous, as it is contrary to the first principle of criminal jurisprudence, viz: that every man is presumed innocent until he has been *proven guilty*. The latter clause in the charge does not correct the error. To say the least of it, the charge on this point was so contradictory and confused, that the jury might well *have been led into error*; and this of itself would be sufficient ground for a new trial.

The Attorney-General, for the state: —

1st. The indictment in this case charges the commission of an offence described in section 1, chapter 73, of the Revised Statutes. That section describes but one offence, viz: the keeping and maintaining of a common nuisance, but specifies different modes in which that offence may be committed. The offence is the keeping and maintaining a common nuisance; but it may be committed in either one of the modes mentioned in the statute. *State v. Nelson*, 29 Maine, 334.

2d. It is sufficient to charge an offence in the precise words of the statute creating it. *State v. Ladd*, 2 Swan's Rep. 226;

Hamilton v. Commonwealth, 3 Penn. 142; *Updegraff v. Commonwealth*, 6 Serg. and Rawle, 5; *State v. Boughbee*, 3 Blackford, 308; *Whiting v. State*, 14 Conn. 487; *State v. Little*, 1 Vermont 331; 6 Ib. 594; *United States v. Gooding*, 12 Wheaton, 460. The indictment in this case follows the precise words of the statute, or their exact equivalents.

3d. If the indictment charged the commission of a statute offence, the court did not err in refusing to charge the jury that it was also an offence at common law. It was immaterial whether it was or was not a common-law offence.

4th. To sustain the indictment, it was not necessary to prove that the offence had been committed in all the modes enumerated in the statute. If proved to have been committed in either one of those modes, it was sufficient. *State v. Nelson*, 29 Maine, 334. The words, "used for the illegal sale and keeping of intoxicating liquors and for the habitual resort of intemperate, idle, dissolute, noisy, and disorderly persons," are not mere words of description, but they declare the modes in which the offence is charged to have been committed. The words, "for the habitual resort of intemperate, &c.," are equivalent to the words of the statute, "where intemperate, &c., are in the habit of resorting." The charge of the court was substantially according to the request of the defendant's counsel, as stated in his fourth exception.

BRAYTON, J. The first point made by the defendant in the argument is, that this indictment does not charge any offence described in the statute upon which the indictment was framed. Chapter 73, section 1, of the Revised Statutes, declares all grog-shops, tippling-shops, or buildings, places, or tenements, used for the illegal sale or keeping of intoxicating liquors, or where intemperate, idle, dissolute, noisy, or disorderly persons are in the habit of resorting, to be common nuisances; and section 2d provides, that any person keeping or maintaining any such common nuisance, shall be punished as therein provided. This statute declares that such place, building, or tenement, kept in either of the modes described, is a common nuisance, and the keeper thereof punishable. The indictment charges the defendant with keeping a place and tenement in each and every

of these modes ; — that he kept it as a grog-shop, as a tippling-shop, and also, that he kept it for the illegal sale of intoxicating liquors, and for the resort of idle, dissolute, noisy, and intemperate persons. But because he is charged with having kept it in all the modes, the argument is, that it is not charged to have been kept in any one. The defendant might have been charged with keeping the place solely for the illegal sale of intoxicating liquors, adding only the allegation of time and place ; and in that case, it is admitted, that the indictment would have been sufficient to charge the keeping of a nuisance under this act. But it is not the less charged, because there is also a charge of keeping it in another mode. The objection here is, not that several statute offences are charged in the same count, but that no one of them is. The same may be said of the charge of keeping a grog-shop, or of a tippling-shop, and of the charge of keeping a place resorted to by idle, noisy, and intemperate persons. Each of these modes of keeping is alleged. Either of them would constitute the offence created by the statute. In fact, however, but one offence is here charged, — one nuisance, though it is charged that the offence was committed in each of several modes. The act contemplates, and the indictment contemplates, but one offence, but several modes in which it may be committed, either of which constitutes the offence. The indictment is framed upon the statute, and in alleging the offence, follows the language of the act creating it, in all the contemplated modes. This is allowable in criminal pleading ; and it is held sufficient to allege the commission of the offence in the language of the act.

The second point made by the defendant is, that the indictment does charge an offence at common law ; and he excepts, because the judge who tried this cause declined so to direct the jury. It was quite sufficient that the indictment charged a statute offence ; and the judge was quite right in directing the jury, that if they found the statute offence proved, it was not material whether any common-law offence was, or was not, alleged, — that the inquiry was unnecessary.

Another matter of exception is, that the judge refused to

charge the jury, that in order to convict the defendant, it was necessary for the government to prove, not only that the building, place, or tenement, was used for the illegal sale or keeping of intoxicating liquors, but also, that intemperate, idle, dissolute, noisy, or disorderly persons were in the habit of resorting there; but did charge the jury, that it was not necessary to prove both, and that proof of either was sufficient.

This exception assumes, and so the argument of the defendant is, that all the allegations of the indictment as to the mode of keeping are material and necessary to be proved, in order to a conviction. The strictness of even the criminal law does not extend to this. It is true, that as a general rule, no allegation, whether necessary or unnecessary, which is descriptive of the identity of that which is legally essential to the charge, can ever be rejected, but must be proved, as laid; and therefore, in larceny, where it is necessary to allege the ownership of the property, the name of the owner must be truly stated, and proved as laid. So, in burglary, it is necessary to state the ownership of the house; and it must be stated truly, and proved as laid, or there will be a variance. And in larceny, where the indictment describes the property stolen with unnecessary minuteness, so as to distinguish it from all others, it has been held, that it must be proved to come within that description; and this is held, because the pleader undertakes to identify it by minute description, and makes the description material; and the instance is given, of the allegation of a black horse, when the word black might have been omitted, but being inserted as descriptive, it was held that it must be proved.

There is however another rule equally universal; — that such allegations as may be entirely omitted without affecting the charge against the defendant, and without detriment to the indictment, are considered as surplusage, and may be disregarded in evidence; *United States v. Howard*, 3 Sumner, 15; that it is only necessary to prove so much of that which is alleged as is legally necessary to constitute the offence charged; and under this rule many examples are given. Under this last rule the case of the defendant will fall. It is not neces-

sary to prove the charge to the whole extent laid. 2 Russ. on Crimes, 786. On a charge of setting fire to a barn in the night-time, it was held not necessary to prove it to be done in the night-time; that not being legally necessary to constitute the offence. So, in an indictment for obtaining goods by false pretences, where several false pretences are alleged, it is held only necessary to prove one, if the goods were obtained by means of that one; and the others may be rejected. So, on a charge of composing, printing, and publishing a libel, it is not necessary to prove that it was *composed* by the defendant. *Rex v. Hunt*, 2 Camp. 583; *Rex v. Williams*, *Ib.* 546. Very many other cases might be cited, all proceeding upon the same principle; and see *State v. Nelson*, 29 Maine, 329.

In the case at bar, all that was necessary to constitute the offence, was the keeping of the building, place, or tenement for the illegal sale or keeping of intoxicating liquors; and this being proved, and that it was maintained by the defendant, the offence is proved against him; and all the other allegations, not being necessary to the offence, may be disregarded in evidence.

Another ground of exception is, that the judge did not charge the jury, though desired so to do, that in order to convict the defendant, the facts proved and relied upon by the government must be of such a character that their existence could not reasonably be reconciled with any other hypothesis than that of the guilt of the defendant. This proposition, as the bill of exceptions states, was assented to by the court, of course in the presence of the jury; and therefore must have gone to them in connection with the language afterwards used by the judge in his direction to them. The subsequent directions do not contradict this proposition stated by counsel, though it was not in terms repeated to them by the judge, after giving his assent in their presence to its correctness. He said, that if the testimony in the case was as consistent with the innocence of the defendant as with his guilt, they must acquit, if otherwise, they need not; but if, nevertheless, they had any reasonable doubt upon the whole evidence as to the guilt of the defendant, he was entitled to an acquittal. We do

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not think the jury could have misunderstood this, or could have supposed that the judge intended to deny that the proposition, assented to by him to be correct, was one by which they were to be guided; and they must have understood, that although the evidence was not entirely consistent with his innocence, yet it must leave them without reasonable doubt of the defendant's guilt. We think the jury had substantially the direction asked, though it may not have been in the form requested.

Exceptions overruled, and the cause remanded to the court of common pleas.

STATE v. DANIEL MACE.

Upon an indictment for keeping the nuisance of a cockpit, an entry on the cash-book of a gas company, crediting a sum of money as paid by the defendant for gas furnished to him at the cockpit, held admissible to pass to the jury, to prove that the defendant kept the pit at the time referred to in the entry, although verified only by proof that the entry was in the handwriting of the former cash-keeper of the company, and was made in the regular course of business; it being also proved that the cash-keeper was absent from the state, and in parts unknown.

INDICTMENT against the defendant for keeping at Providence, for gain, a certain disorderly house, called "the Empire Saloon," resorted to by persons of ill-fame and dishonest connection, for cockfighting and misbehaving themselves, to the common nuisance of the good citizens of the state.

At the trial of the indictment before *Shearman*, Justice, with a jury, at the December term of the court of common pleas for the county of Providence, 1858, amongst other evidence offered on the part of the state, to prove that the defendant was the keeper of said house at the time laid in the indictment, was the cash-book of the City Gas Company, containing an entry crediting the defendant with \$3.90 paid by him at said time for gas used in the Empire Saloon, with the evidence of the

superintendent of the metre department of the company, that the book was the cash-book of the company, and that the entries therein were made by one Thomas F. Vaughn, a former clerk and book-keeper of the company, who had then recently left the state, and was in parts unknown. This evidence was, notwithstanding the objection of the defendant, suffered for the above purpose to pass to the jury, together with testimony on the part of the defendant, that in a former trial of the indictment, said Vaughn swore that said sum of \$3.90 was paid to him by another person than the defendant. The court charged the jury, that the entry was, at best, evidence of the very lightest character, and would have been entitled, in any event, to but little weight; but that, taken in connection with the testimony of Vaughn, no inference whatever could be drawn from it, and the jury should give it but little, if any, consideration. The jury, having returned a verdict of guilty against the defendant, who had duly excepted to the admission of said cash-book as evidence against him, he now brought his exception to this court for the correction of the error charged therein.

Thurston & Ripley, for the defendant: —

The court erred in permitting the book containing the entry in question to go to the jury as competent evidence, tending to prove the allegation in the indictment, that the defendant was the proprietor of premises on Orange Street, called the Empire Saloon.

The material point upon which the defendant relied for an acquittal was, that he was not, during the time named in the indictment, the proprietor of the place. With the exception of the piece of evidence which is objected to, no testimony of any weight bearing upon that question was offered by the government before closing the case, and had not the book been admitted, it is doubtful if the counsel of the defendant would have deemed it necessary to produce any witnesses upon the question.

By permitting entries in the books of third persons, with which the defendant is not shown to be connected, to affect the

defendant in a criminal proceeding, he is deprived of the benefit of that provision of the constitution which permits him to be confronted with the witnesses against him.

The proof was offered as tending to show that the defendant was the proprietor of the place charged as a nuisance. The jury were asked from this to draw an inference from an inference—1st, to infer, that the entry, “Dan Mace,” related to the defendant; and 2d, to infer, that the payment was on account of the Empire Saloon.

Had the evidence been offered in a civil suit *between the Providence Gas Company and the defendant*, the books would have been inadmissible. *White (Rec'r) v. Ambler*, 4 Selden, 170; *Brewster v. Doane*, 2 Hill, 537; *Union Bank v. Knapp*, 3 Pick. 97; *Wilbur v. Selden*, 6 Cowen, 162; *Merril v. Ithaca & Owego R. R. Co.* 16 Wend. 595; *Glover v. Hunnewell*, 6 Pick. 222.

J. B. Kimball, attorney-general, for the state : —

1st. It is well settled in England, and in this country, that entries, made by third persons in the regular course of their business, are admissible as original evidence of the transaction of which such entries formed part of the *res gestæ*. *Price v. Torrington*, 1 Smith's Leading Cases, 139; *Higham v. Ridgway*, 10 East, 328; *Doe v. Turford*, 3 Barn. & Adol. 890; *Digby v. Sledman*, 1 Esp. 328; *Welch v. Barrètt*, 15 Mass. 380; *Nichols v. Webb*, 8 Wheaton, 326; *Augusta v. Windsor*, 1 Appleton, 317. And numerous cases cited in note to *Price v. Torrington*, in 1 Smith's Leading Cases.

2d. The fact of the death of the person making such entries is not material to the admissibility of such evidence, although in most of the reported cases the death was proved. The entries were admitted upon the ground of their contemporaneous character, and their being made in the ordinary course of business. See cases above cited, and 1 Greenleaf on Evidence, p. 164, § 120.

3d. Absence of a witness from the state, so that his attendance cannot be procured by the aid of process from the court, has the same effect so far as regards the admissibility of this class of evidence, as the death of such witness. *Elms v. Chevis*,

2 McCord, 349; *Alton v. Bergham*, 8 Watts, 77; *Sterrett v. Bull*, 1 Binney, 234-237; *Crouse et al. v. Miller*, 10 Serg. & Rawle, 155; *Union Bank v. Knapp*, 3 Pick. 96; *Kinney v. Flinn*, 2 R. I. Reports, 319; and 1 Greenleaf on Evidence, above cited.

4th. Whether the entries were admissible or not, they could have had no weight with the jury under the charge of the court, and contradicted, as they were by the sworn statement of Vaughn; and the fact of their being admitted is therefore no ground for new trial. *Handley v. Call*, 27 Maine, 35; *Deerfield v. Northwood*, 10 N. Hamp. 269; *Prince v. Shepard*, 9 Pick. 176.

5th. If the entry was improperly admitted by the court at the time it was offered, it subsequently became admissible to contradict the testimony of Vaughn, whose evidence was offered by counsel independently of the previous admission of this entry, and upon a claim of right. The order in which the testimony was submitted to the jury is not material, upon a motion for new trial, if the court are able to see that all the evidence in the case was admissible at some stage or other of the proof. *Wilson v. Bibb*, 1 Dana, 7; *Rucker v. Hamilton*, 3 Ib. 36.

Bosworth, J. In this cause, evidence was admitted to pass to the jury of a certain entry in a book, being the cash-book of the Providence Gas Company. The purpose of the evidence was, to prove that the defendant paid for gas used at the Empire Saloon in the city of Providence; the question being, whether the defendant was proprietor and manager of the said saloon. The entry was made in the book by one Thomas F. Vaughn, who was alleged to be without the jurisdiction of the court. The testimony was admitted upon proof of the handwriting of said Vaughn, it being admitted that Vaughn was out of the jurisdiction of the court, and in parts unknown.

The general principle, as established by the leading English and American cases, is, that entries made in the regular and usual course of business are admissible in evidence after the death of the person who made them, on proof of his handwriting. In some of the states of this country absence from the state, as far as it affects the admissibility of secondary evidence,

has the same effect as the death of the witness. In Massachusetts insanity has been held equivalent to death. In New York and Alabama the strict rule is adhered to, that the person who made the entry must be dead to render the entry admissible. The principle as established by the American decisions, on which an entry is admitted as evidence, seems to be, that the acts of men performed in the usual course of business and committed to writing, being under obligation to do the act, and where there is no inducement to misstate facts, may be relied on as evidence of things done as they occur. On this principle, entries made in the regular and usual course of business are admitted as proof, although the person who made them may recollect nothing of the facts, upon his testifying to the authenticity of the entry. It would seem, therefore, if this evidence may be admitted, when the person who made the entry is present to verify the book, the entry being all that constitutes the evidence, if he be dead or absent, secondary proof that it was kept by him is admissible, on the same ground that a subscribing witness to an instrument, being absent, his handwriting may be proved, or a copy of an instrument, when the original is lost, may be offered in proof. All that is necessary to render the entry admissible as evidence, if the witness is living, is, that he shall testify that the entry was made in the regular course of business in his handwriting; and if he be absent or dead, other witnesses may be competent to testify to that.

We think, therefore, that the testimony was properly admitted. Whether, when admitted, the entry amounted to any proof of the fact, to establish which it was introduced, is another question. If it did not, it was irrelevant testimony. It was a mere memorandum of money received to credit of cash, from the defendant. In a subsequent stage of the trial, the defendant put in evidence what the person who made the entry swore to on a former trial, which went to show that the gas bills for the Empire Saloon were not paid by the defendant, but that the money was received from another person. It is contended that the entry in the book is competent testimony in answer to

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this testimony offered by the defendant. We are inclined to think, that the testimony was irrelevant, and, on that ground, ought not to have been admitted. But we do not see how it could affect the verdict of the jury. The judge charged the jury that it was evidence of the very lightest character, and entitled, in any respect, to very little weight, and that in connection with the testimony of Vaughn on the former trial, it was entitled to very little if any consideration, and that no inference whatever could be drawn by the jury from said entry. We think it could not have affected the verdict injuriously to the defendant, and is not a sufficient cause for awarding to him a new trial. The ruling of the judge, in effect, excluded it from the case, as affirmative testimony on the part of the state.

STATE v. JOB SWEETLAND.

Where, upon the trial of an indictment for keeping the nuisance of an alehouse, the defendant passed to the jury a book of charges for the purpose of confirming the testimony of a witness who kept the book, and who swore that at the time laid in the indictment he furnished ale by the cask, at the alehouse, not to the defendant, but to another person; *held*, that it was no ground for a new trial, that the jury might have been influenced to convict the defendant by the suspicious appearance of the book, commented on by the attorney-general without opportunity on the part of the defendant, to answer or explain; or, that the jury might have been swayed by other charges in the book against the defendant, relating to a period prior to that laid in the indictment, to which the attention of the jury was not directed, and which it was not proved that they saw.

MOTION for a new trial by one convicted of keeping the nuisance of an alehouse, on the grounds, that the jury improperly considered entries in a book of accounts submitted to them by the defendant, to which their attention was not called, and upon which the defendant had no opportunity, through his counsel, to comment, and that the verdict was against the weight of evidence. The facts are sufficiently set forth in the opinion of the court.

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Thurston and Ripley, for the defendant.

J. B. Kimball, attorney-general, for the state.

BOSWORTH, J. This is a motion for a new trial grounded on facts as follows: At the trial of the case in which the petitioner was indicted for keeping a nuisance, he produced a witness who testified that he furnished ale by the cask, during the time laid in the indictment and prior thereto, to one Christopher Brown, who, as the defendant alleged, was the proprietor of the place named in the indictment as the place where the nuisance was kept. On cross-examination, the witness stated that he knew the fact from recollection, and from a reference to his book of charges which he had, on the morning of the trial, examined at the request of the defendant. He was asked to produce the book referred to, and thereupon went for his book and returned after the defendant's counsel had commenced the argument of his case. The book was then without objection passed to the jury by the defendant's counsel. Upon the argument of the case in the close, in behalf of the state, the attorney-general referred to the book, directing the attention of the jury to the charge against the said Brown, contending that upon inspection it was apparent that the charge referred to had been altered from Sweetland to Brown. The defendant produces the affidavit of the witness that the said charge had not been altered as the attorney argued, and explains the apparent alteration, in a manner which did not occur to him or to his counsel at the trial.

Another fact is, that on a page in the book prior to the one to which the attention of the jury was called, there was a charge for ale made to the defendant, bearing date prior to the time laid in the indictment. The defendant alleges, that he is informed that the jury were influenced in their verdict by this fact, without keeping in mind that this charge was of a date prior to the first day named in the indictment.

We do not see in either of these allegations any ground for a new trial. There is no mode of determining whether the verdict of the jury was influenced by the last-named fact or not. There is no proof offered on this point which establishes the facts, either that they saw this charge, or considered its

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import. By a statement of the evidence it appears, that the witness testified that he ceased to sell ale to the defendant prior to the date of this charge. If the jury did see the charge on the book referred to, it might very naturally in their minds shake the credibility of the witness's testimony; but it does not appear whether they saw it or not. Their attention was not directed to this charge; it is not proved that they gave any attention to it, and whether it was proper or improper that they should, we have no reason to infer that they did. The appearance of the book, we think, was a fair subject of comment on the part of the attorney-general, since the defendant had himself put it into the case. The leaves of the book being submitted to our inspection, it seems to us evident that there was once another name written under what appears on the book now. We think it affords no reason for granting a new trial, that possibly, or even probably, the suspicious appearance of the book may have prevented the jury from giving the amount of credence to the testimony of the witness which they might have given had not the book been put into the case.

The motion for new trial is denied.

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10	42
10	464
12	591
12	592
13	138
6	92
17	274
6	92
24	800
24	801

MARTIN & GOFF v. ALFRED F. PEPALL.

A husband in the actual possession of the wife's real estate, no trustee of the same having been appointed under the "Act concerning the property of married women," is, notwithstanding the provisions of said act, so far seized of her real estate, that where his interest in the same is sold under a decree against him for the enforcement of a mechanic's lien, the purchaser may maintain trespass and ejectment against the husband to recover possession of such estate.

TRESPASS and ejectment, to recover possession of a dwelling-house and three lots of land, situated on Bacon Street, Providence. Plea, the general issue.

At the trial of the case before the court, to whom the same was submitted in fact and law, it appeared, that the plaintiffs claimed title to the premises by virtue of a deed executed to

them by a master of the court of common pleas of the county of Providence, under a decree of sale of a portion of the premises, rendered at the June term of said court, upon a petition under the mechanics' lien law, between the same parties. The premises consisted of three lots of land; the title of lot No. 1 being in the defendant, and of lots No. 2 and 3 in his wife. The dwelling-house, upon which the work was done by the plaintiffs, originally stood upon lot No. 1, but was removed by the husband to lot No. 3, belonging to his wife, and had been removed to said lot when the contract of the plaintiffs to put the house in repair was performed, and the work was done. The three lots were used by the husband and wife in common, being in one enclosure; the barn standing on the husband's lot No. 1, and the wife's two lots Nos. 2 and 3—except so far as occupied by the house,—being used as a garden. The decree in the lien suit recited the amount due to the plaintiffs upon their contract for the repair of the house made with the defendant, and also recited, that the plaintiffs had a lien for the amount "upon the house and other buildings and improvements, and on lots Nos. 2 and 3," making no reference to lot No. 1; and ordered the dwelling-house, &c., and the defendant's interest in lots Nos. 2 and 3 to be sold, &c. The deed executed by the master to the plaintiffs bore date Oct. 17, 1857, and pursued the language of the decree.

Metcalf, for the plaintiffs, contended, that it must be presumed that the house stood upon the wife's lots, Nos. 2 and 3, with her consent, so as to warrant an entry thereon by the plaintiffs, as purchasers, under the decree, of the house; and if so, to warrant an ejectment to secure the right of the plaintiffs to remove the house.

W. H. Potter, for the defendant, urged, that the house being upon the wife's land, in which she was protected from her husband's debts by the married woman's act, ejectment could not be maintained for possession of the house and land without impairing the wife's rights; that, besides, the house was personal estate only; so that the remedy of the plaintiffs was trover, and not ejectment; or they might enter and remove the house; the decree giving them a license to do so.

BRAYTON, J. In this case, the defendant claims that the plaintiffs have shown no possessory title in themselves sufficient to maintain ejectment; that under the act entitled "an act concerning the property of married women," the entire interest, right, and title to the land described, was vested in Catharine J. Pepall, the wife, solely, and to her sole and separate use; and that Alfred Pepall, the husband, had not, at any time, any title or interest in the premises which could be taken in any way for his debts, and, therefore, that nothing passed by the sale and conveyance of the master, under the decree for sale.

The first section of the "Act Concerning the Property of Married Women," Dig. 1844, p. 270, provides, that the real estate, &c., which are the property of any woman before marriage, or which may become the property of any woman after marriage, shall be, and are hereby so far secured to her sole and separate use, that the same, and the rents, profits, and income thereof, shall not be liable to be attached, or in any way taken for the debts of the husband, either before or after his death.

It further provides, that the receipt or discharge of the husband for the rents and profits of such property, shall be a sufficient discharge therefor, unless previous notice in writing shall be given by the wife to the lessee, debtor, or incorporated company, from whom such rents and profits are payable.

The fourth section of said act provides, that nothing in this act shall be construed to impair the rights of the husband, upon the death of the wife, as tenant by the curtesy.

The question here is, what are the rights of the husband in the real estate of his wife secured to her sole and separate use, so far as it is so secured to her by the provisions of this act?

It is not expressly declared, anywhere, that an estate coming to her after marriage shall be absolutely secured to her sole and separate use; but that it shall be so far secured, that it shall not be attached, or in any way taken, for the husband's debts; nor shall the rents, profits, or income. It is, nevertheless, declared, that the husband may receive the rents and profits to his own use, unless and until, the wife shall, by a notice in writing to those from whom they are due and payable, forbid the payment

to him; and from the time of such notice only, shall she be secure in the payment of them to her sole use. No authority is given by the act to the wife to convey, lease, or release, the estate or the income thereof, without the joining of the husband therein. His right, as tenant by the curtesy upon her death, is not to be in any way impaired, even by the written notice. The act evidently contemplates that some of the common-law rights, interests, or powers, are vested in the husband; and that the rights of the wife, as they existed before the statute, though greatly enlarged, are not to be so far extended as to exclude all control of the husband in the same absolute manner as he would be excluded from the control of an estate, if conveyed expressly to her sole and separate use.

By the common law, upon the marriage, the husband became seized with the wife of her estate; and acquired a freehold *jure uxoris*, which would continue during their joint lives. 2 Kent, Com. 730. As husband, he had the right to take the rents and profits of the estate to his own use. *Ibid.*; Co. Lit. 351 *a*. He had the power to lease the estate even before the birth of issue; and the wife could not avoid the lease till his death. 2 Saund. 180 *a*, *n. g*.

Upon the birth of issue, he became possessed of an indefeasible estate for his own life, which he might convey. In case of treason committed by the wife, her estate became forfeited to the king; but the forfeiture did not extend to the husband's estate after birth of issue. If the husband committed treason, his estate by the curtesy became forfeited; but if before the birth of issue, though the forfeiture did not carry with it an estate for life, it gave to the king what is termed the pernancy of the profits, and, necessarily, a right of possession to take them. Co. Lit. 351 *a*.

A lease made by the husband gave the tenant under it the right of possession for the same purpose,—to take the rents and profits.

Though the second section of this act provides that the husband shall not, without joining the wife, sell, convey, or lease her chattels real, it does not, *in terms*, declare any such prohibition as to her real estate. This restriction as to chattels real

was either superfluous, or it expressed in words, what must have been implied from the language of the preceding section. We cannot presume it to have been intended merely to repeat a prohibition before made. If it be intended as a prohibition now first made, it includes chattels real only, and not the real estate. If he had power before the act to execute leases and vest the tenant with the right of possession, that right is not now destroyed by any express provision; and by implication, at least, it was not intended to restrict it.

The purpose of this act, undoubtedly, was, as is apparent upon its face, to secure to the wife the receipt of the rents, issues, profits, and income of her estate, for her support and maintenance. It was, however, no purpose of the act to protect the husband against his creditors. For her security in this respect, the act has provided two modes, by which the income shall come to her sole use; *first*, if the husband be in possession, taking the rents and profits to his own use, as the notice in writing served upon him would not enable her to obtain the income, since she could not sue him if he refused to pay over, she has the power, upon petition in equity, to have a trustee of her estate appointed, who will take the rents and profits for her use; and, *secondly*, if the estate be under lease, or in the occupation of third persons, she may give to them the notice in writing prescribed by the act, and thereby secure the payment to her, and prevent payment to her husband. By these means, she is secured in the receipt of the income and profits, in so far, that from the time she exercises either of these powers, the income and profits cannot go to the use of any other person. These powers she may exercise at her election, and at any time when she may think her interest requires, or she may choose; and from that time the power of the husband ceases. But since the act did not intend to protect the husband in the receipt of the income to his own use, there seems to be no good reason why his common-law rights should be interfered with, until the wife shall deem it necessary for her protection and security; or, at least, shall express her desire that his power over the estate should cease by one of the modes provided.

The defendant, in the exercise certainly of a common-law right, places a dwelling-house upon the land of his wife, he being in the actual possession, taking the rents and profits as was his right, without the appointment of any trustee of that estate. He employed mechanics to labor upon and furnish materials for it; and by means of such employment and labor and materials furnished, a lien was created by force of the statute upon the building and upon his interest in the land; and under the decree establishing the lien and ordering a sale for the payment of the sum found due, that interest was sold and conveyed to the plaintiffs. Neither the condition of the defendant, nor his right in the estate, have been changed by act of the wife down to this time. The effect of all this is, to pass to the plaintiffs neither more nor less than might have passed by a lease from the defendant to the plaintiffs. It is a statute conveyance of the same right and interest. When conveyed, it remains in their hands defeasible in the same manner and by the exercise of the same powers as would defeat the husband's right unconveyed; and the plaintiffs, though they may be put into possession of the premises, are liable the next instant, upon notice from the wife, to pay the rent to her; or, upon the appointment of a trustee, may be compelled to yield up possession to him for the sole use of the wife.

Nevertheless, we see no reason why they should be debarred from the recovery of a defeasible interest, more than of one which is indefeasible. It is theirs, until the true intent of the act renders it necessary that it should be avoided.

Judgment must, therefore, be for the plaintiffs, for possession.

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ANSON W. ALDRICH v. HENRY B. LYMAN.

A promise to pay a sum certain in consideration of a reciprocal promise to contribute a larger sum towards a contingent liability, in a negotiation interesting to both parties, is supported by a sufficient consideration.

Where both counts of a declaration relate to the same cause of action, and one is good and the other bad, a verdict for entire damages on the whole declaration will be supported, upon motion in arrest, by being applied to the good count.

MOTION in arrest of judgment. The declaration, which was in assumpsit, contained two counts. The *first* count alleged, "that whereas the plaintiff was, on the 22d day of April, A. D. 1854, possessed of a certain lot of land, situated in the westerly part of the city of Providence, and the defendant, with one George S. Rathbone was, on the same day, possessed of another lot of land adjoining thereto; and whereas the ownership of a third lot of land adjoining the two above mentioned was in controversy at the same time between Josiah Westcott and Catharine A. Westcott, on the one hand, and Earl Carpenter, trustee under the will of Mary Carpenter, Job Carpenter, Henry G. Carpenter, Henry Tilden, and Catharine A. Tilden, heirs and next of kin of Mary Ann Carpenter, deceased, on the other hand; and whereas the city of Providence had agreed to give the sum of seventy-five thousand dollars, in gross, for a lot of land for the site of a city hall, which included and embraced all the lots above mentioned, with other land; and whereas, Earl Carpenter, and the others with him above mentioned, were willing and agreed, in the event that the title of said third lot above mentioned was finally declared to be with them, to receive in full satisfaction of all their interest and estate therein, of said seventy-five thousand dollars, the sum of thirty-three hundred and fifty dollars, leaving the balance to be distributed among the other owners of said land as might be agreed, whereas, the said Westcotts, in the event that the title in the same lot should be decided to be in them, demanded of said sum of seventy-five thousand dollars, the sum of forty-two hundred and fifty dollars, for said land; in consideration of all which, it was agreed by and between the said defendant and the plaintiff,

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that he, the said defendant, would pay to the plaintiff the sum of *two hundred and fifty* dollars, parcel of said sum of *nine hundred* dollars, difference between the two sums of \$3,350 and \$4,250 above stated, if he, the said plaintiff, would assume the risk of contributing the sum of \$550 for the same purpose, in the event that the title to the said lot should be found to be in the said Westcotts, which the said plaintiff then and there agreed to do; in consideration of which undertaking on the part of the plaintiff, and the incurring by him of the liability and risk above mentioned, he, the said defendant, then and there, at said Providence, to wit: on the 23d day of March, A. D. 1855, promised the plaintiff to pay him the sum of two hundred and fifty dollars on demand. And the plaintiff avers that he has done and performed all things on his part in reference to said agreement to be done and performed, yet the said defendant, though often requested, has not paid said sum or any part thereof, but refuses to pay the same."

The *second* count alleged, "that the defendant, at said Providence, to wit, on the 22d day of March, A. D. 1855, in consideration that the plaintiff would incur the risk of contributing towards the sum of \$900, the sum of \$550, in the event that the title to a certain lot of land situated in said city of Providence, was found to be in one Josiah Westcott and Catharine A. Westcott, instead of the other persons in the first count mentioned, whereby the plaintiff and the defendant and all others owning any portion of a certain lot of land embraced in the site for the proposed city hall would become liable to pay to the said Westcotts the sum of \$900, in addition to the sum of \$3,350, otherwise agreed to be received and taken for the same land by the claimants thereto, promised the plaintiff to pay him the sum of two hundred and fifty dollars; and although the plaintiff has done all things by him to be done and performed, the said defendant has not paid said sum or any part thereof, but refuses to pay the same, although requested," &c.

At the trial of the case, under the general issue, at the September term of this court, at Providence, 1858, the plaintiff having recovered against the defendant a verdict for the sum of \$272.50, the defendant moved in arrest of judgment for the following reasons:—

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1st. Because, in neither count of the plaintiff's declaration is there any sufficient legal consideration set forth to support the alleged promise of the defendant.

2d. Because, the verdict being for entire damages upon the whole declaration, there being in the first count thereof no sufficient legal consideration set forth to support the alleged promise of the defendant, the judgment ought to be arrested.

3d. Because, the verdict being for entire damages upon the whole declaration, there being in the second count thereof no sufficient legal consideration set forth to support the alleged promise of the defendant, the judgment ought to be arrested.

James Tillinghast, for the defendant:—

1. If either count of the declaration is insufficient, the verdict being for entire damages upon the whole declaration, the judgment must be arrested. *Onslow v. Horne*, 3 Wilson Rep. 185; Cowper's Rep. 276; *Clough v. Tenney*, 5 Greenl. Rep. 446; *Stevenson v. Hayden*, 2 Mass. Rep. 406; *Livingston v. Rogers*, 1 Caine's Rep. 347; *Sylvester v. Downer*, 18 Verm. Rep. 32; 1 Chit. Plead. 294, 295.

2. The first count of the declaration shows no cause of action, as it shows no consideration to sustain the defendant's promise. This count is evidently framed on the idea of mutual promises. But, first, for this alleged promise of the plaintiff to constitute a sufficient consideration to sustain the promise of the defendant, the plaintiff's promise, as set forth, must be such as could be enforced against him. 1 Parsons on Contracts, 374 and note *h*, and cases cited; *Governor, &c., of Copper Miners v. Fox*, 3 Eng. Law & Eq. Rep. 420; *Lester v. Jewett*, 12 Barb. 502. But this promise or undertaking of the plaintiff, as set forth in this count, could not be enforced against him by any one. Not by the defendant; for it appears, from the statement of the case as here put, that he was not the person beneficially interested in the \$550, and there is no averment it was to be paid to him. It was merely to be contributed by the plaintiff in connection with others to make up a deficiency. Nor could the Westcotts or the city enforce this promise against the plaintiff. For they were entire strangers both to the consideration and to the contract; the consideration to the plaintiff did not

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move from them, and no promise is averred to them. Story on Contracts, § 130, p. 83; *Price v. Easton*, 4 Barn. & Adol. 433; 24 Eng. C. Law, 96.

Again, for mutual promises to be a sufficient consideration the one for the other, they must be *concurrent*. Story on Contracts, § 128, p. 81; 1 Chitty's Plead. 297; *Livingston v. Rogers*, 1 Caine's Rep. 583, per *Kent*, C. J.; *Keep & Hale v. Goodrich*, 12 Johns. 397. But in this first count the promises are not so laid. The plaintiff's promise is laid of *April 22*, 1854; the defendant's, as of *March 23*, 1855.

3. At all events the second count is clearly bad.

First. For the reason specified above, that the alleged promise of the plaintiff could not have been enforced against the plaintiff by any one.

Second. It is not averred here even, that the plaintiff ever did assume the risk which was to form the consideration of the defendant's promise.

Third. It is expressly averred, that in the contingency supposed, the plaintiff was already liable; and it does not appear that this, his present liability, was not equal to the whole \$550 he was to assume, and therefore, it does not appear that the plaintiff assumed any new liability; and if he did not, it could form no consideration for the defendant's promise.

Fourth. The general averment that "although the plaintiff has done all things by him to be done and performed," is not a substantial averment, and is by no means equivalent to an express averment, that he did assume the risk, and that risk was beyond his prior liability. But even if it was, yet it would still be bad as not showing *how* he assumed the risk. *Phillips v. Fielding*, 2 H. Black. 123. Nor is this defect aided by the verdict. A want of averment of consideration is not so aided; for the verdict only finds the fact of the defendant's promise, and "that furnishes no legal intendment or inference that the promise was founded upon any consideration." Gould's Pleading, chap. 10, § 22, p. 503; 1 Salkeld, 364.

Thurston & Ripley, for the plaintiff:—

The two counts in the plaintiff's declaration set forth the

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contract substantially as proved at the trial, and set forth a sufficient legal consideration. *Chitty on Contracts*, 28.

After a verdict upon the merits, the court will not set it aside for mere technical defects in the declaration, when enough appears to show the foundation of the action, and the verdict and recovery may be pleaded to another action for the same cause. *Baldwin v. O'Brien*, Coxe, 218; 1 Chit. Pl. 673; *Porter v. Kepler*, 14 Ohio, 127.

BOSWORTH, J. This is a motion in arrest of judgment, on two grounds: 1st. That the two counts in the declaration are bad for want of a sufficient allegation of consideration; and, 2d. That if one count is good, the other is bad, and the damages being entire, no judgment ought to be rendered on the verdict.

The first count sets out the facts, that the city of Providence proposed to purchase a lot for the site of a city hall, which lot embraced land owned by the defendant, land owned by the plaintiff, and other land, the title to which was the subject of a suit between two other parties; that the city agreed to pay \$75,000 for the whole, and the several owners were to adjust their several portions of this sum among themselves. One of the claimants to the lot in controversy agreed to take for his share of the gross sum, if he prevailed in the suit, \$3,350; the other demanded, if the title should vest in him, \$4,250. There would be, therefore, in the event of one party's succeeding, \$900 difference to be shared or paid between the plaintiff and defendant. By the first count in the declaration it is alleged, that the defendant, in consideration that the plaintiff took the risk of paying, and agreed to pay \$550 of this sum in the event that said \$900 should become necessary to be paid, promised the plaintiff to pay him the sum of two hundred and fifty dollars; and the plaintiff avers, that he did assume said risk, and did promise to pay said sum in said event, whereby the defendant became liable to pay to the plaintiff the said sum of two hundred and fifty dollars.

We think that the assuming a contingent liability, and promising to pay a definite sum, in an event which the parties contemplated might happen, is sufficient to support a concurrent

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promise to pay an amount certain, made by the party to whose benefit the assumption of the contingent liability was to enure. The first count, in our judgment, may be supported after verdict.

The second count is defective. The question then arises whether judgment can be rendered on the verdict, the damages being entire? Both counts respect one and the same cause of action. The evidence on the trial was all applicable to the first count. The two counts are, indeed, but different modes of stating the same cause of action. A judgment in the cause, as set out in the first count, would be a conclusive bar to another action for the same claim in whatever form it might be stated. It is proper, therefore, that judgment should be rendered on the first count in the declaration. *Eddowes v. Hopkins*, 1 Doug. 376; *Williams v. Breedon*, 1 Bos. & Pul. 329; *Spencer v. Goter*, 1. H. Blacks. 78; *Harrison v. King*, 1 B. & A. 161; *Barnard v. Whitney*, 7 Mass. 358; *Patten et al. v. Gurney et al.*, 17 Ib. 182, 187; *Clark v. Lamb*, 6 Pick. 512, 516; *Jones v. Kennedy*, 11 Ib. 125, 131; 1 Chit. Plead. 411, 12th Am. ed. and notes; Gould's Plead. ch. 10, §§ 58, 60, 61, p. 523, n. 7.

The motion therefore, is denied.

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Where money is advanced to a third person for the use of the defendant, and at his request, or, to the defendant, upon the note of a third person, accompanied by the promise of the defendant to meet the note, the obligation of the defendant to repay the advance is primary, and does not require written proof, as if it were a promise to pay the debt of another.

Where the plaintiffs had advanced to the defendant the amount of a note of a third person, which the defendant had procured to be made directly to them, upon the defendant's promise to meet it at maturity if not collected of the maker, and instead of being collected it was sold by the plaintiffs, without the knowledge of the defendant, for less

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than its face; *Held*, that the subsequent approval by the defendant of the sale, and promise to pay the difference between the amount advanced upon the note and the proceeds of sale, was, as a ratification of the sale, equivalent to a prior authority to the plaintiffs to sell, instead of waiting to collect, the note.

An agreement by the parties to promissory notes, made subsequently to the notes, that certain commissions, contemplated by the agreement to be earned by the maker of the notes in the business of the holders, should be applied to the payment of the notes, if sufficient, until the whole amount due upon them was paid, and if the whole amount was not thus paid at the maturity of the notes, that a renewal note should be received for the balance payable in two years, is no bar to an action upon the notes, within the two years, for the recovery of the amount due thereon.

The mere taking of security from the principal debtor upon promissory notes, by way of mortgage of his property, is no discharge of a surety upon the notes.

THESE were actions of assumpsit, brought by the plaintiffs, who were steam-engine builders, to recover of the defendant, who had been a contractor for the building and furnishing of steam-cotton mills, a large sum of money, as due by promissory notes, for money advanced, and for work and labor done. The declarations counted upon three several promissory notes, made by the defendant, all dated August 16, 1852, payable to the order of Thurston, Greene & Co. and held by the plaintiffs under indorsements in blank; two, for \$6,000 each, one of which was payable in two, and the other in three years after date, and both indorsed by Alfred R. Fiske, a son-in-law of the defendant, and former partner in the plaintiff firm; the third note, counted upon, being for \$5,000, payable three years after date, and not bearing Fiske's indorsement. The declarations also contained counts for work and labor, and the usual money counts.

Both actions were, at the March term of this court, 1859, under pleas of the general issue, submitted, by agreement, to the same jury at the same time. At the trial before Mr. Justice Bosworth, amongst other claims made by the plaintiffs under the money counts, was one for \$225, for money advanced by the plaintiffs, at the request of the defendant, to General Ward B. Burnett, of the city of New York. The evidence upon this claim, as reported by the judge was, that the plaintiffs received a letter from the defendant requesting them to deposit in the Mechanics' Banking Association, in New York, to the credit of Burnett, the sum of \$225, and stating, that it was desirable not to be known in the transaction; that if a certain contract was

obtained, then "all right"; but if not, then the money would be repaid; that the sum was deposited by the plaintiffs as requested, was by them charged in their books to Burnett, and was afterwards spoken of in a letter written by them, as money loaned to Burnett; that, subsequently, upon their calling upon Burnett, by letter, to repay to them the amount, he replied, declining all explanation with them upon the subject, as persons, so far as he knew, having no connection with the matter, and stating, that he expected soon to see the defendant, when he would remind him what he paid the money for. The defendant requested the court to charge the jury, that the plaintiffs could not recover said sum of him unless they produced a promise on his part, in writing, to pay the same, or, unless they proved that said sum of money went to the use of the defendant. The court, however, declined to give this instruction, but told the jury, that unless they were satisfied by the evidence that the money was advanced by the plaintiffs to the defendant, and for his use, the defendant was not liable in these actions.

Another claim made by the plaintiffs against the defendant, under the money counts, was for \$1,000, advanced by the plaintiffs to Lyman Frieze, at the request of the defendant. The request of the defendant to the plaintiffs to make the advance by an acceptance at four months, he engaging to meet it, and stating, that it was to relieve Frieze from a liability which he had incurred on the defendant's account, was proved by the defendant's letters. One of the plaintiffs swore, also, to their acceptance of Frieze's draft for \$1,000, and to their taking it up by their promissory note, which was subsequently paid by them. Upon this state of the evidence, the defendant requested the court to instruct the jury in the same manner as he had before requested with regard to the advance to Burnett, which the court declined to do, and instructed the jury in the same way with regard to this, as with regard to that, claim.

A like request was refused, and a like instruction given, with regard to a claim for the sum of \$124, made by the plaintiffs under the money counts, for a deficiency arising from the sale of the note of one Wilson. The evidence upon this claim, as

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reported, was, that the defendant brought to the plaintiffs a note of one Wilson for \$500, made payable to them, and that they furnished him the money upon it, he requesting them to collect it; that at the maturity of the note it was sent to New York, where Wilson was, for collection; that the person to whom it was sent sold the note for less than its face by the amount claimed, and remitted to the plaintiffs the proceeds of sale; that the sale was subsequently spoken of by the defendant as a good one, and that the defendant promised the plaintiffs to pay them the difference between the amount of the note, advanced to him thereon, and the sum for which it was sold.

To the promissory notes counted upon, as made by the defendant to Thurston, Greene & Co., several defences were set up :—

First : That by a written agreement, entered into between said Thurston, Greene & Co. and the defendant on the 29th day of October, 1852, and produced in evidence, the defendant was to have a commission of five per cent. upon all the work that he should procure to be done at the shop of said Thurston, Greene & Co., to be credited to him when the work was paid for, and applied to the payment of said notes until all were paid, provided the commissions should amount to a sum sufficient to pay them; and that, in case said commissions did not amount to a sum sufficient to pay all of said sums at maturity, the balance remaining unpaid should be renewed for two years, the renewal note to be indorsed by Alfred R. Fiske. By reason of this contract, the defendant requested the court to charge the jury, that the defendant had a right to pay, and was only liable to pay said notes by the application of his commissions specified in the contract; and that if the notes were, or might at any time be payable in money, or in any other way than by such commissions, it was a condition precedent to such right of recovery that the plaintiffs should commence no action upon the notes until the expiration of five years from the date thereof. The court qualified the instruction asked, by telling the jury, that if the defendant had not paid the notes according to the contract, he was liable to an action to recover the amount due upon them.

The *second* defence to the notes, in substance, was, that although upon their face the defendant was the principal, and Alfred R. Fiske only secondarily liable, yet in truth, upon the evidence, Fiske was the principal and the defendant only a surety, as was well known to the plaintiffs when they took the note, and that time had been given by the plaintiffs to Fiske without the consent of the defendant; and the defendant requested the court to charge the jury, that if, upon the evidence, they found such to be the true relative position of Fiske and the defendant, and that the plaintiffs had given time to Fiske on said notes, the defendant was discharged therefrom.

This instruction the court gave to the jury; but also instructed them, that the mere receiving by the plaintiffs of property from Fiske as security, or by way of mortgage, for the payment of the notes, would not discharge the defendant therefrom.

It appeared further, that Alfred R. Fiske, a former partner in the plaintiffs' firm, on the 23d day of June, 1857, for a nominal consideration, assigned to Henry W. Gardner, another copartner, all his interest in the property of the firm, and at the same time received from Gardner an instrument, which, after reciting that Fiske was indebted to the plaintiffs as indorser of the two notes in suit, for six thousand dollars each, and in other sums of money, contained a covenant by Gardner, that upon payment of said notes and other sums of money due the firm at any time within five years from date, he would reconvey Fiske's interest in the firm property, subject to its debts, to Phebe Fiske, the wife of Alfred.

The defendant requested the court to charge the jury, that, by the proper construction of this contract, the plaintiffs gave to said Fiske an additional period of five years for his whole debt to them, including said notes guarantied by him. This request the court refused to give. The remaining evidence is sufficiently stated in the opinion of the court to render the opinion intelligible.

Under these instructions the jury having found, in one of the actions, a verdict for the plaintiffs for the sum of \$16,800, and in the other for the sum of \$9,013.87, the defendant now

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moved for a new trial, upon the ground of error in matter of law in the above instructions and refusals to instruct.

T. A. Jenckes, for the defendant :—

First. As to the matter embraced in the first three rulings excepted to, the defendant cannot be held liable for the amount of the items therein referred to, unless some promise or agreement in writing, signed by him, and binding him to pay the same, was produced in evidence. No such writing was offered, and the court should have directed a verdict for the defendant on these items, upon the evidence submitted. No debt owing from the defendant to the plaintiffs is shown in either of these cases. *Brown on Stat. of Frauds*, sect. 154–160.

Second. The proper construction of the contract of Oct. 29, 1852, is as stated in the request to charge, embodied in the fourth exception.

Third. The action was prematurely brought upon the notes in suit, as controlled by the contract of Oct. 29, 1852. *Facquire v. Kynaston*, *Ld. Raymond*, 1249; *Mussen v. Price*, 4 East, 147; *Price v. Nixon*, 5 Taunton, 339; *Helps v. Winterbottom*, 2 B. & Ald. 431.

Fourth. The court should have complied with the defendant's requests to charge the jury with regard to the relative position of Fiske and the defendant, as principal and surety, and the effect of the conduct of the plaintiffs in discharging the latter's suretyship upon the notes sued. 2 Am. Lead. Cases, 317, 451, and cases cited.

Fifth. The proper construction of the instruments of June 23, 1857, was to vest the property conveyed in the plaintiffs absolutely, giving time to Fiske to pay his debt, with a condition, that if he should pay it within the time limited, certain rights would accrue to his wife, which might or might not have been enforced or complied with.

Thurston for the plaintiffs :—

1st. As to the amount advanced to Burnett. This instruction was correct. The act of forwarding money at the defendant's request and presumably for his benefit, to Burnett, did not make Burnett debtor to the plaintiffs, so as to bring the transaction, with respect to the defendant, within the provisions of the statute of frauds.

The fact that the money was entered on the plaintiff's books as a charge against Burnett, is only evidence proper for the jury to consider upon the question whether the loan was in reality made by the plaintiffs to him, and might well be outweighed by the fact that Burnett was personally unknown to them, and by the circumstances under which the money came to be sent. The undertaking of the defendant was not to pay the debt of another, but was a request to them to furnish money to a particular person, and it is fairly to be presumed for his own purposes and benefit. Roberts on Frauds, 216; Browne on Frauds, sects. 198, 199.

2d. As to the amount paid on the Frieze acceptance. This instruction was correct; for it was entirely immaterial to the defendant how the plaintiffs advanced the money to Frieze, whether by their note, or acceptance, or in cash.

3d. As to the deficiency in sale of the Wilson note. The question for the jury was, whether the plaintiffs had purchased the note of the defendant, or had only furnished the money to him upon it for his accommodation. It did not appear that the plaintiffs and Wilson had any transactions with each other; and it was competent for the jury to find under the evidence, that the money was furnished upon it for the benefit of James, and that he assented to the disposition of the note, by sale.

4th. As to the contract of October 29, 1852. There was no evidence that the defendant had ever procured any work upon which he could claim a commission; in fact, the defendant sought to justify his neglect on the ground that the plaintiffs had broken their agreement made with him. There was no evidence that the defendant ever offered to renew the notes. With respect to the objection that the action could not be maintained until five years after the date of the notes, it could apply but to two of the notes, as the third was more than two years overdue when the suit was commenced, but the objection was altogether too late; the pleadings would not admit of the question being raised. *The agreement being executory is no bar to the action.* Hawes et al. v. Marchant, 1 Curtis's C. C. R. 136; Dorr v. Tuttle, 4 Mass. 414; Perkins v. Gilman,

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8 Pick. 229; *Central Bank v. Willard*, 17 Pick. 150; *Walker v. Russell*, 17 Pick. 233; *Delacroix v. Bulkley*, 13 Wend. 71; *Allen v. Kimball*, 23 Pick. 274.

5th. As to the relative position of Fiske and the defendant, whether that of principal and surety, it was properly left, upon the whole evidence, to the jury.

6th. As to the effect of a giving of time by the creditor to the principal without the assent of the surety, the court charged as requested, but also properly charged that a receipt of property by way of security from the principal, did not, of itself, amount to such giving of time, or affect the creditor's right at law to proceed against the surety.

7th. As to the agreement of June 3, 1857. The court properly ruled that the agreement was not one of "giving time." The right to sue Fiske on the notes was unaffected by it; and even if it were otherwise, it could only avail the defendant in the event that the jury found that Fiske was the real maker of the notes and the defendant a surety.

BOSWORTH, J. These were actions brought by Thurston, Gardner, & Co. of the City of Providence, against Charles T. James, to recover the amount of three promissory notes, two of them for \$6,000 each, and one for \$5,000. The notes were signed by the defendant, and two of them were indorsed by Alfred R. Fiske, son-in-law of the defendant. The note for \$5,000 had no indorser upon it. There were several other causes of action embraced in the declarations, some in reference to which there was no dispute at the trial. There were three matters of claim under the money counts of the declaration, which were disputed on the trial. Upon the rulings and charge of the court, in reference to these three claims, as well as in reference to the three notes aforementioned, exceptions were taken, which are to be considered in determining this motion for a new trial.

The first three exceptions relate to the rulings of the court upon the claims set up under the money counts. The plaintiff, at the request of the defendant, had caused a sum of money to be placed to the credit of a third person in a banking institution in New York, and had charged the money to the person to

whose credit it was placed. The defendant, at the time of making the request, desired that the plaintiffs' name should not be known in the transaction, and stated, that if the Sickles' patent was obtained, it would be all right; if not the money would be paid back. Subsequently the plaintiffs wrote to the party in New York, to whose credit the money was placed, on the subject, and received an answer denying all knowledge of the plaintiffs in reference to the money, and all accountability to them; saying, that when he saw the defendant, he would remind him what he paid him the money for. In a letter from the plaintiffs to the defendant the matter was spoken of as the loan to the third person. The defendant requested the court to charge the jury, that he was not liable for the amount claimed, unless a promise in writing to pay it was produced and proved. The court did not so charge; but did charge, that unless the jury were satisfied from the proof, that the money was paid to the use of the defendant and at his request, he was not liable in this action. It is plain, that there was no error in this charge. It was of no importance whether the promise was in writing or not. If the money was paid for the defendant's use, and at his request, he was liable whether the promise was verbal or written. If it was the debt of another, the defendant would not be liable under the money counts in the declaration, whether the promise was in writing or not. Under this charge, the jury must have found that the money was advanced on the personal credit of the defendant. To this fact the plaintiff, Gardner, on his direct examination in the cause, testified. We think the matter was properly left to the jury, and their verdict ought to be satisfactory.

The second and third exceptions are of the same character, as to the claims of the plaintiffs for money advanced to Frieze, upon the Wilson note, and are overruled, on the same grounds.

One other ground is however embraced in the third exception. It seems that the amount of a note for \$500, less the discount, was advanced by the plaintiffs to the defendant, which note was made by James J. Wilson, and was payable directly to the plaintiffs. This note was not indorsed by the defendant but was delivered by him to the plaintiffs, he request-

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ing them to collect it. At the maturity of the note, it was not paid, and the plaintiffs sent it to New York, where it was sold for less than the amount due upon it. The amount collected was credited to the defendant, and the balance was claimed in this suit. The sale was made without the knowledge of the defendant; but on learning the fact he pronounced the sale a good one, and promised the plaintiffs to pay them the balance. We think the jury had a right to infer from this ratification of the sale, an authority to make it; and the judge did not err in refusing to charge the jury, that by reason of this sale the defendant was discharged from his liability.

The instructions claimed by the defendant as to the contract of October 29, 1852, could not properly have been given. This contract provided, that the defendant should perform certain services for the plaintiffs, for which he was to receive certain payments, which payments were by the agreement to be indorsed on the notes for \$6,000 and \$5,000, above referred to, as they were earned, until the full amount of the notes was paid; and further, if the sums to be thus earned by the defendant should not be sufficient to pay the notes in full, at the time when they became due, then the notes were to be renewed for the balance for two years. This contract bore date subsequent to the date of the notes. At the times when the notes became due, nothing had been earned by the defendant, to be applied on the notes under the contract. The notes had all become due when the suit was commenced; no part of them had been paid, and no renewal had been made or offered. The court were asked to instruct the jury, that under the contract, the defendant had a right to pay, and was only liable to pay in his services as specified in said contract; and consequently that the plaintiffs could not recover the amount of the notes in this suit. The plaintiffs had made a contract with the defendant collateral to the notes, which the defendant had not performed, and therefore he claimed, that he was not liable to perform the principal contract. The terms of the collateral contract can bear no such absurd interpretation. The court instructed the jury, that though by the terms of this contract the defendant had a right to pay in his services, yet if he

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had not so paid, he was liable in a suit on the notes. By the fifth exception it appears, that the court refused to instruct the jury, that said contract being in evidence, it was a condition precedent, that the plaintiffs should not commence their action on the notes until the expiration of five years from the date of said notes. There was no such condition expressed, but merely an agreement, that if the notes should not be fully paid by the application of the defendant's earnings at their maturity, they should then be renewed for two years. If there was such a condition precedent, it must be inferred from this agreement for renewal; and in that case, the agreement would amount to an agreement not to sue for two years after the maturity of the notes. If the defendant had performed his promise under the collateral contract, *i. e.* made the contemplated payments before the maturity of the notes, and then renewed his notes for any balance that might have remained due, the purpose of the collateral contract would have been attained, and the plaintiffs would have been liable on the collateral contract for damages if they had refused to renew. But the evidence showed, that he had made no payment under that contract nor renewed the notes; and with respect to one of the notes in suit, the true time to which a renewal would have extended the liability of the defendant had expired when these suits were commenced.

It is well settled, that an agreement, or a covenant not to sue for a given time, does not amount to a defeasance and cannot avail as such, but is a covenant only on which an action may be brought for damages; though a covenant never to sue may avail as a release to avoid circuitry of action. *Dorr v. Tuttle*, 4 Mass. 414; *Perkins et al. v. Gilman*, 8 Pick. 229; *Central Bank v. Willard*, 17 Pick. 150; *Allen v. Kimball*, 23 Pick. 473; *Chandler v. Herrick*, 19 Johns. Rep. 129. There was, therefore, no error in the refusal of the court to instruct the jury as requested.

As to the alleged error complained of in the rulings of the court with regard to whether the defendant was a surety on the notes sued, and discharged by the acts of the plaintiffs, we cannot see that it would have been proper for the court to have given instructions more favorable for the defendant than were

given ; or, that there is, in what the court charged or omitted to charge, any reason for granting to the defendant a new trial. The court permitted the defendant to introduce evidence which, as he claimed, went to show that the defendant, though appearing on the face of the notes in suit as principal, was, in reality, a surety only, and charged the jury, that if from the evidence they found that he stood in the relation of a surety, he would be entitled to the equitable defence which a surety has by law, when the holder of the note has given time to the principal, if in this case they found that time had been given.

The case shows, that at the time when the notes were given by the defendants, Alfred R. Fiske received from the plaintiffs a conveyance of one quarter interest in the copartnership property of Thurston, Gardner, & Co. The defendant testified, that this conveyance was the consideration for the notes, two of which were signed by him and indorsed by Fiske, and one of them was signed by the defendant alone. The court were asked to charge the jury, that if they found that this conveyance to Fiske entered into and formed the consideration, or a part of the consideration of the notes, then said Fiske was the original or contracting party on the notes, and the defendant stood in the relation of guarantor or surety. The court refused to give this instruction ; but left the fact to be found by the jury from the whole evidence in the case. There can be no doubt as to the propriety of the court's refusal to charge as requested. The fact of the conveyance certainly was not conclusive upon the point. The defendant might buy the property for his son-in-law, and direct the conveyance to be made to him. The fact that one of these notes had not the name of Fiske upon it, and the fact that by the collateral contract provision was made that all the notes might be paid by the personal services of the defendant, would indicate that the defendant was the principal on the notes. How could Fiske be principal on a note which he had not signed at all ? Certainly the instruction asked would have been improper had it been given.

It also appeared, that on the 23d of June, A. D. 1857, Fiske had conveyed his one quarter part of the copartnership prop-

erty to Henry W. Gardner, one of the plaintiffs, taking from him a bond that in case of the payment of the said notes and his other liabilities to the firm of Thurston, Gardner, & Co. at any time within five years, he would make conveyance of said property to the said Fiske's wife. The court were asked, in view of that fact, to instruct the jury, that the acceptance of that conveyance discharged the defendant from his liability on the notes to the extent of the value of such property. The court did not so charge. Clearly they could not so charge. In the first place, this conveyance was not made to the plaintiffs; and though the bond given by Gardner to Fiske contemplated a holding of the property as security until the notes were paid, the plaintiffs had no other than a mortgage interest in it, and that not standing in their names. It could not, therefore, be held as payment whereby the defendant was discharged. Nor could the taking of this conveyance be held, as the defendant requested the court to charge that it should be, as a giving of time on the contract for payment of the notes, so as to discharge the defendant, considering him as surety on the notes. There was, in the fact of taking this conveyance, even if it had been taken by the plaintiffs, no giving of time, in the sense in which the law holds the giving of time to the principal to be a discharge of the surety on a note. The plaintiffs were not debarred from prosecuting their claim against Fiske the next day after the contract was made. Nor was there anything to prevent the defendant from paying the notes and pursuing his remedy against Fiske, if any he had, whenever he might choose to do so. Under such circumstances, the taking of security can work no injury to the defendant, even if he were a surety. Indeed it must be to his advantage; as by a proper proceeding in equity, if he were a surety, he could make that security enure to his own benefit, to the extent of its value.

On the whole, among the many exceptions taken to the rulings of the court in this case, we find no error of which we think the defendant can complain, and no ground for awarding to him a new trial.

Motion denied with costs.

 Love & Wife v. Howard; Waterman v. Same.

HORACE T. LOVE & WIFE v. GEORGE A. HOWARD.

ROBERT W. WATERMAN v. SAME.

Where in a lease of a city lot for ninety-five years, — the rent to be appraised at the end of the first fifteen years, and every five years thereafter during the term, — the lessee covenanted, "that he would pay, or cause to be paid, all taxes and assessments that might, at any time during the term, be assessed upon said lot or its appurtenances," it was held: that the covenant did not extend to a city assessment upon the landlord for benefits derived to his reversion from the laying out of a new street contiguous to the lot, for which improvement the tenant, according to his interest, was also assessed; inasmuch, as the assessment was made under an act not in existence at the time of the execution of the lease, was novel and extraordinary in its character, and could not have been in the contemplation of the parties when the covenant was made.

THESE were actions of debt, brought by the plaintiffs, claiming as interested, jointly with others, in the reversion of the Howard Building estate in Westminster Street, Providence, against the defendant, as lessee of said estate, to recover of him under the covenants of his lease, certain assessments levied by the city of Providence, upon their interest in said estate, for the benefits by them received from the laying out and opening of Dorrance Street.

The declarations, in substance, set forth the lease of the premises to the defendant by Richard Waterman, of Coventry, under whom the plaintiffs claimed title, — the assessments made upon their reversionary interest in the premises for the laying out and opening of Dorrance Street, and their payment of the same.

To the declarations, seven pleas were filed, in each of the actions, by the defendant; upon two of which pleas, — *non est factum*, and that the demised premises were not assessed as alleged in the declaration, — issue was joined to the coventry, and to the other five of which the plaintiff demurred, generally.

As the judgment of the court upon these demurrers turned exclusively upon the sufficiency of the declarations, or rather, upon the obligation of the defendant to pay the assessments sought to be recovered by virtue of the covenants of his lease,

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it will be unnecessary to state the pleas demurred to, or the points made upon them, or, in other respects, upon the declaration, by the counsel on either side.

The lease, which was by indenture, bore date January 1, 1847, and was for a term of ninety-five years, with stipulations for the appraisal of the rent at the end of the first fifteen years, and at the end of every five years thereafter, during its continuance. It contained a mutual covenant, which provided, "*that all taxes and assessments of every kind, that might at any time during the continuance of the lease be assessed upon said lot, or its appurtenances, should be paid by the lessee, his executors, administrators or assigns;*" and a further covenant by the lessee on his part, "*for himself, his heirs, executors and administrators, to and with the lessor, his heirs and assigns, that the lessee would pay or cause to be paid all taxes and assessments that might, at any time during said term, be assessed upon said lot or its appurtenances.*"

T. A. Jenckes, for the plaintiffs :

1st. The covenant in the lease is comprehensive in its terms, and cannot be limited so as to charge the owners of the reversion with any tax or assessment which may be assessed on the estate demised during the lessee's term. The questions which have arisen in England, upon the covenant to pay taxes contained in leases, have been the consequence of the want of such words in the covenant as would leave no doubt as to the intention of the parties. The complaint, in almost every instance, has been the obscurity of the language in which the covenant is expressed. Thus, in the case of *Hopwood v. Barefoot*, 11 Mod. 238, a covenant to pay parliamentary taxes was held to extend only to those *in esse* at the time of making the lease; but, as was remarked by *Powell, J.*, had the words been "all taxes which may hereafter be assessed by parliament," all taxes whatsoever would have been included. The form suggested in 2 Platt on Leases, 170, is this: "All taxes, rates, assessments, and impositions whatsoever which now are, or at any time during the continuance of said term may be assessed or imposed," &c. "By the adoption of this

or a similar comprehensive form," says the author, "most of the questions which have formerly arisen on the subject are now avoided." And see generally 2 Platt on Leases, ch. 10, § 3, and cases cited. The question as to the liability of the lessee in the cases at bar on the covenant is, of course, to be decided from the language of the covenant itself and from nothing else. That language is clear and explicit. It binds the lessee to pay "all taxes and assessments;" not those only which were assessed at the time the lease was made, but all which might "at *any time during said term*" be assessed upon said lot and its appurtenances. His liability is not limited to any particular class of taxes or assessments, but to all that might be assessed while he continued the lessee of the estate. A tenant bound himself by covenant in a lease to pay "all burdens and taxes." There was no tax upon the estate at the time of the execution of the lease, but parliament afterwards granted a fifteenth, and he was held liable for it under his covenant. Case in 33d year Hen. VIII., cited by *Holt*, C. J., in *Hopwood v. Barefoot*, 11 Mod. 240. Even in cases where there have been exceptions of certain taxes in the covenant, taxes of the same nature and apparently coming within the exception, have been held to be payable by the lessee. Thus a lessee covenanted to pay all rates, assessments, &c., both ordinary and extraordinary, which should, during the term, be rated, assessed, &c., upon the demised premises, *excepting the land tax*, which the landlord was by statute bound to pay, and in consequence of various new buildings erected by the lessee in pursuance of a covenant for that purpose, (it may be remarked that there is a similar covenant in the lease under consideration,) an additional land-tax was imposed; it was held that said additional land-tax should be paid by the lessee. *Hyde v. Hill*, 3 Term Rep. 377. Taking the covenant as it stands, the lessee is clearly liable for all taxes and assessments, of whatever kind, which may be imposed upon the demised estate during the continuance of the lease.

2d. Under the covenant contained in this lease, the lessee is liable to pay the assessment for laying out Dorrance Street.

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The covenant binds him to pay *all taxes and assessments* which may, at any time during his term, be assessed upon the estate demised. This was assessed during the continuance of his term. He is, therefore, liable to pay this. A lease contained a covenant on the part of the lessee to pay all taxes and assessments which might be imposed on the premises or any part thereof by authority derived from the United States, the State of New York, or the corporation of the city of New York, and an improvement was made by the city of New York, in the opening of Lafayette Place, which took a part of the leasehold premises, and it was held, that the lessee was chargeable with the amount of the assessment upon the interest of the lessor in the premises. *Astor v. Miller*, 2 Paige, 69. This case is also cited in 2 Bac. Abr. tit. COVENANT, E. 3. The case cited determines those at bar. Those at bar are, indeed, stronger. In the one cited, the lessee bound himself to pay all taxes and assessments imposed by the authority of the United States, the State of New York, and the City of New York. But the lessee, in these cases, binds himself to pay "all taxes and assessments which may at any time during his term be assessed upon the estate demised to him; of course, binding himself to pay all which may be assessed by any legal authority. His covenant runs with the land demised, binding him and his assigns so long as he or they hold the premises under the lease. He cannot—particularly as the value of the buildings he has erected has been vastly increased by the laying out of Dorrance Street—avoid his liability to pay the amount imposed upon the estate by the city in making that improvement.

3d. The estate having been assessed in the name of the plaintiffs, and the amount having been paid by them after demand on the defendant and upon his refusal to pay, they are entitled to bring debt to recover the amount so paid with interest. 1 Saunders on Pl. & Er. 898; Com. Dig. tit. DEBT, A. 5; *Withers v. Moore*, 3 Barn. & Cress. 254. Covenant and debt are concurrent remedies for the recovery of any money demands where there is an express or implied contract in an

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instrument under seal to pay it, but in general debt is the preferable remedy, &c. 1 Chit. on Pl. (5th ed.) 134.

4th. The plaintiffs in this action being tenants in common of the estate assessed, and having paid their proportional part of the assessment, are entitled to recover the amount so paid without joining the other cotenants. Platt on Covenants, 129; *Eccleston v. Clipsham*, 1 Saund. 153; *James v. Emery*, 8 Taunt. 245; Esp. N. P. 117; Bac. Abr. Joint Tenants, K.

James Tillinghast, (with whom was *Bradley*,) for the defendant:

1st. The declaration is bad. It appears, affirmatively, upon the face of the declaration, that there are other parties who ought to have been joined as plaintiffs; that the plaintiffs are not the sole owners or devisees of the estate on which the assessment was made, and this is fatal on demurrer. 1 Chit. Plead. 13; 1 Saund. Rep. 154, note (1), 291 (6); *Scott v. Godwin*, 1 Bos. & Pull. 67; *Schott v. Burton*, 13 Barb. 173, 183; *Calvert v. Bradley*, 16 How. U. S. Sup. Court, 580. The plaintiffs here and there, co-devisees claiming under the original lessor, are tenants in common of this land, and as such, by operation of law, are joint covenantees under the defendant's lease, and must join in actions upon its covenants. 1 Chit. Plead. 11, 12, and note 1; Coke Litt. § 316; 4 Dane Abr. 55, § 7; *Calvert v. Bradley*, 16 How. Sup. Ct. U. S. 580; *Bradburne v. Botfield*, 14 Mees. & Welsb. 558; *Scott v. Godwin*, 1 Bos. & Pul. 67; *Schott v. Burton*, 13 Barb. 173; *Merrill v. Berkshire*, 11 Pick. 269; *Gilmore v. Wilbur*, 12 Pick. 120; *Daniels v. Daniels*, 7 Mass. 135.

2d. The declaration shows no cause of action. It does not show that the provisions of the act under which this assessment is claimed to have been made were complied with, and so shows no legal assessment.

3d. This assessment is not embraced within the covenant here declared upon, as it is for a permanent improvement, is extraordinary in its nature, and could not have been in the contemplation of the parties, as there was then no statute in force authorizing such an assessment.

BRAYTON, J. It is objected to this declaration, that it shows no cause of action in this, that although it sets forth the covenant made by the defendant, yet that the assessment alleged, and for non-payment of which the defendant is now sought to be charged, is not, upon a proper construction of the covenant, within its terms and intent; that, as it was for a permanent improvement of the estate, was extraordinary in its character, and not in use at the time the covenant was made, it could not have been in the contemplation of the parties.

The defendant's covenant is, that he will pay, or cause to be paid, at the time the same shall become due and payable, all rents accruing under this lease, and "*all taxes and assessments that may at any time during said term be assessed upon said lot or its appurtenances.*"

The question raised is not new to courts of law. It has been frequently in times past mooted in the English courts, and become the subject of judicial decision; and some rules of decision have been announced in regard to it.

In *Davenant v. Bishop of Sarum*, 2 Levinz, 68, the lease was made in 1635, and contained a covenant to pay all taxes during the term. In 1665, in the reign of Charles II., a tax was ordered by parliament—a kind of assessment—in which it was provided, that the tenant, who was first to pay the assessment, might deduct a portion from the rent payable by him. It was unlike any which had been before ordered by parliament. The question was, if the lessee under his covenant was bound to pay it to the relief of the lessor; and it was held, that he was not. In that case, it was said by the court that this covenant cannot oblige him to pay the new tax; but it must be understood of such taxes as were then in use. In *Hopwood v. Barefoot*, 11 Mod. 240, the covenant made in 1672 was this: that the lessee "shall pay all sum and sums of money that now is, or shall be assessed or taxed, for or in respect of the premises demised as aforesaid, for chimney money, church and poor, or visited houses, or *otherwise*, above and besides the rent reserved thereupon." The lease was renewed in 1698 with the same covenant. The question was, whether the land-tax was included in the covenant. *Gould, J.*, said: The words "*or otherwise*"

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wise" must mean something, and make it a charge on the tenant; and that the tax of royal aid (the tax in question) had been before the covenant. *Powell*, J., said: If a tax be given by parliament which was never *known before or in esse*, these words would not extend to these taxes; but if it had been, "all taxes which should be thereafter imposed by parliament," all taxes whatever, would be included; and adds, the first taxes were tenths and fifteenths, till eight of Edw. III., which were upon goods, and were uncertain until *subsidies* came in Elizabeth's reign, and in 1641 the land-tax. To all these the covenant will extend; but not to any of a *different nature*. Lord *Holt*, in this case, stated, that it had been adjudged, that when there was a covenant to discharge the lessee of all burdens and charges, and there being no tax at the time, a fifteenth was afterwards ordered by parliament, such tax was within the covenant, because the tax was always a charge *in viris*; and said, if this covenant had been before 1642, it had not bound the tenant because there had been no such tax before; and cited the case of *Brewster v. Kidgill*, 12 Mod. 166. This case arose out of a wager. The defendant affirmed that he had a right to deduct 4s. in the pound for parliamentary taxes. This he claimed against his covenant, which was this: "It is the true intent of these presents, that the grantee, his heirs and assigns, shall forever thereafter be paid the said rent charge without deduction or abatement of taxes, charges, or payments, out of, or concerning said rent, or the said manor, or land charged therewith." The question was, whether the grantor of the rent charge should be allowed to deduct the amount of tax imposed by parliament after the grant; and Lord *Holt* said, it had been a question, for a long time, whether such covenants extended to all future parliamentary taxes, "which I think would be very hard, and I cannot agree thereto in this large sense; but we are all of opinion that it extends to all *those sorts* of taxes that shall be given by future acts of parliament;" and concluded, by saying, "when this covenant was made, taxes of this nature had been used four or five years. This assessment was begun since the war in 1642. If this covenant had been in 1640 it would not reach this case."

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In *Giles v. Hooper*, Carthew, 135, upon a covenant "to pay £80 rent, free and clear of all manner of taxes, charges, and impositions whatsoever," it was held, that the covenant included all land taxes whatsoever, although there was no land tax at the time; that having been ordered long after the making of the lease and covenant; and this, because the land tax was known and understood, and to be made as occasion required.

So, in *Bradbury v. Wright*, Doug. 624, on a similar covenant, viz., "to pay without any deduction, defalcation, or abatement, for or in any respect whatsoever;" it was held, on the authority of the preceding cases, that it extended to all land taxes.

The rule recognized and adopted in these cases is, that if the tax or assessment be made under a law existing at the time of the covenant, it is within it; or if there be no law existing at the time authorizing or requiring it, but it is afterwards enacted, still, if the assessment or tax be of the same kind with taxes or assessments made under former acts, it is presumed to have been in the contemplation of the parties, as a tax *in viris*, though not *in esse*. But if such tax or assessment be different in kind from such as have been theretofore *in esse*, it is not to be presumed that the parties contemplated any unusual exercise of power in the legislature, such as it had never before exercised. The land-tax act seems not to have been a continuing act; but these taxes were levied by act of parliament as the public exigencies from time to time required; but as they had been used, in the language of Lord Holt, they were not of a foreign nature, but known to the law, and had always a *virtual*, though not an *actual*, existence; and speaking of the covenant, he says: "It does not provide against an unusual accident, but against a thing well known to our law as part of the constitution."

In *Mayor, &c., of New York v. Cashman*, 10 John. 96, the covenant of the lessee was, that he would, "at his own proper cost and charge, bear, pay, and discharge all such duties, taxes, impositions, and payments, as shall, during the term hereby demised, be issued, grow due, and payable out of, and for the said demised premises." The assessment in this case was for opening a street in the city of New York, and was made under a

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statute similar to the one under which the assessment was made in the case before us; and the question was, if the assessment was within the covenant? In giving the judgment in that case, the cases in 11th and 12th of Modern are referred to, as those by which the question was to be determined; and the court say: "The assessment was made in pursuance of a statute in force at the time when the covenant was made, and which, we must presume, was in the contemplation of the parties."

There are one or two cases cited by the plaintiff's counsel, apparently for the purpose of showing that the rule of these cases has been shaken or reversed. They are cases in which questions between landlord and tenant under the land-tax act have arisen. The case of *Hyde v. Hill*, 3 T. R. 377, is one. The covenant in this case was, that the tenant should pay "all, and all manner of rates, payments, assessments, and impositions, both ordinary and extraordinary, whatsoever, &c., *the land tax only excepted*;" and the lessee covenanted to lay out £400 in building on the premises four houses. Prior to the lease, the tax annually was £3 8s.; after the new houses were built, they were assessed, in addition, for £5 12s. The lessee paid the increased tax; and the question was, whether he had the right to deduct it from the rent; or, in other words, whether the lessor was bound to pay. The court held, that the land tax excepted was the tax which the *landlord was before* bound to pay; and to see what that was, that they must look to the act which directed the tenant to pay first, and then deduct so much as the landlord ought to pay. It is evident, that this case is entirely foreign from the question in the preceding cases. There was no question, whether the assessment was, in its kind, different from any existing or known at the time of the covenant. Confessedly it was the same in kind — known and understood — in use at the time. The question there was, whether an assessment upon an increased valuation was excepted, or merely the tax upon the valuation as it was at the time of the covenant.

In *Astor v. Miller*, 2 Paige, Ch. 68, the covenant was "to pay and discharge all such taxes and assessments as might be im-

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posed or rated on the premises, or any part thereof, by authority derived from the people of the State of New York, or of the United States, or from the corporation of the city of New York." No question was made upon this covenant, as to whether it did or did not extend to new taxes of a different kind, or whether the tax was, or was not, new in its nature.

In the light of these cases, then, we are to inquire, whether the assessment in this case was of the same kind and nature with any assessment before known or in use in this state. It had not any actual existence at the time of the covenant. The act under which it was made was passed at the January session, 1854, six years after the making of the lease. It was not necessary that its existence should have been at that time *actual*, if in the language of Lord Holt it had a *virtual* existence; or, in other language of his, it were one "*in viris*"; such as the legislative power had before ordered or authorized, and which it might be foreseen and anticipated that they might again authorize; for in such case, parties covenanting against taxes and assessments would not be providing against unusual accidents, but against things well known and understood. The assessment here was made under the provision of an act for laying out, enlarging, straightening, and otherwise altering, streets in the city of Providence. The act provides, that in making such improvements there shall be an assessment upon the lands benefited by it, both upon the leasehold interest and upon the reversion, of a portion of the damages caused by such improvement. This is to be assessed and apportioned to the several estates benefited, in proportion to the benefit to each, respectively; *i. e.* in proportion to its increased value. It is to be apportioned, also, in case of estates under lease, to the *leasehold* and to the *reversion*, respectively. The assessment here is for the permanent increased value to the state, to the landlord and tenant, respectively; continuing and remaining, as to the landlord, after the expiration of the term.

In looking back to past legislation, we look in vain for any taxes or assessments made upon any such principle, for any similar purpose. In laying, widening, or altering highways, therefore, the expenses and damages caused thereby were paid by

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the towns in which the highways were, and levied in the ordinary taxes for town expenses upon the estates of those liable to taxation, in proportion to the appraised value of their taxable property. But in no case, either for highways or other public improvements, have lands been taxed for the value added thereto by the public improvement. This is certainly a departure from any known mode or purpose of assessments. So novel and extraordinary did the provisions of this act appear when it went into effect, that it was seriously and earnestly denied to be within the constitutional power of the legislature to enact it; and because of its novel and extraordinary nature. The fact that its operation is confined to the city of Providence, and does not extend to the state generally, shows, that it is extraordinary in its kind, and required only by the high necessities of a growing city.

This kind of assessment being newly authorized, — differing in kind from any theretofore existing, — within the rule established and recognized by the preceding cases, is not within the defendant's covenant; but is such as, upon the authority of those cases, could not have been foreseen by the parties at the time, or have been in their contemplation.

But, independently of the cases referred to, must we not come to the same conclusion? There are no words in this covenant pointing to any extraordinary contingency; and in agreeing "to pay all taxes and assessments that may at any time during the term be assessed" upon the estate, while the estate was liable to be taxed and assessed in various ways by state and city, while there were taxes *in esse* and taxes not *in esse* but *in viris*, — taxes which might be laid, because such had been before laid, though not then in existence, it is sufficient to presume, that the parties contemplated, that such as were thus known would be, or might be, levied. It may be fairly presumed, that had it been contemplated by the parties, that at some future time during the lease, the owners of the reversion were to be assessed for, and be liable to pay for value added to their sole interest, — and that, too, a permanently added value, which would enure to, continue, and be enjoyed by them alone beyond the term, — some other provisions would have been

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made than are here contained. It can hardly be presumed, that the tenant would be willing to pay such assessments without some provision for their deduction at the expiration of the term when the estate passed from him to the landlord,—and still less could we presume this in view of the provision in the lease for renewals, that the rate of rent is to be at periods of five years, newly fixed and determined by referees, according to the then rentable value of the estate. It cannot be presumed, that the tenant would agree, or the lessor claim, that the lessee should be first charged with the cost of the improvement, and then charged with rent for it. Yet such would be the effect of the covenant, if the force be given to it which is now claimed.

We are of opinion that this assessment was not within the defendant's covenant; and, therefore, that the declaration sets forth no cause of action. The conclusion to which we have arrived upon this point renders it unnecessary to consider the other questions which have been raised and argued by the counsel.

Judgment must therefore, upon the demurrers, be rendered for the defendant.

THOMAS L. MANCHESTER v. CHARLES F. MANCHESTER.

A militia officer cannot, when out of the state, claim exemption from civil process, upon the ground that he is on his way, under the orders of his commanding officer, to attend a company meeting, for escort duty, within the state; since, in such case, he is without the jurisdiction of his commanding officer.

ASSUMPSIT to recover two thousand dollars, for services done for the defendant, and goods sold and delivered to him; the writ being served by attachment of the defendant's real estate.

The defendant pleaded in abatement of the writ, that at the time of the alleged service of the writ, he was a commissioned officer, to wit: a surgeon, in the Pawtucket Light Guard in the second brigade of the Rhode Island militia, and duly engaged as such, and was going to a place to which he had been ordered

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by Stephen R. Bucklin, the commanding officer of said company, for the performance of military duty, to wit: a place called Manchester Hall, in said state, for the performance of escort duty.

To this plea there was a general demurrer and joinder.

Payne & Colwell for the plaintiff, cited *B. B. Knight & Co. v. Richmond & Carr*, 2 R. I. Rep. 75.

Weeden, for the defendant, referred to Rev. Stats. ch. 180, sect. 3.

BRAYTON, J. The statute, under which the question here made, arises, provides, that "no officer, non-commissioned officer or private, shall be arrested on civil process, while going to or coming from, or remaining at any place which he shall be ordered to attend, for the election of any military officer, or the performance of any military duty."

The command in the writ, in this case, directed the officer to arrest the defendant's body, and for want thereof to attach his goods and chattels, or real estate. The officer has made return that he could not find the body in this state, and has therefore attached the real estate of the defendant. This return, it is true, is *prima facie* evidence only that the defendant was without the state; and the defendant was at liberty to traverse the return as to that. He has not traversed it, and so admits that he was out of the state at the time.

He nevertheless pleads in abatement for want of service, claiming, that under the statute above recited he was exempted from arrest at the time of the service, and says, in substance, that he was a commissioned officer duly engaged, and was going, at the time, to a place in this state, which he had been ordered to attend for the performance of military duty. As the return is not traversed, but is admitted by the plea as part of the record, it must be taken as part of the plea; and the defendant, therefore, in substance says, that he went from his home out of the state, on his way to the place to which he was ordered. The act intends to protect every military officer while acting as such, under orders, and in obedience to them, but no further; and it is difficult to see how going out of the state can be on the way to a place within it, or how he can be acting

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under orders when he is beyond the jurisdiction of the officer who gives them.

The moment that he passed out of the state and into the jurisdiction of another state, he passed beyond the jurisdiction of his commanding officer, and could not properly be said to be acting there under his orders. If not so acting, he was not within the protection of the act.

This plea must be overruled, the demurrer sustained, and judgment be, that the defendant answer over.

ANNA CLAPP v. WILLIAM CLAPP & OTHERS.

A father, having devised certain real estate to S. C., one of his sons, "subject to the restrictions and incumbrances hereinafter pointed out and explained," in a subsequent clause of his will declared: "my mind and will is, and I hereby declare the same, that provided my daughter, A. C. shall, at any time hereafter, choose to live in the family of my son S. C. she shall have the right so to live; and the estate herein given to my said son S. C. shall be subject to that incumbrance during her life, or so long as she shall remain single or unmarried." *Held*, that A. C. had a permanent right to a support out of the estate devised to S. C. not dependent upon the life of S. C., or the keeping together of his family; the living in the family being designed to signify rather the kind of support to which A. C. was entitled, than its duration, which was expressly declared to be for her life, or so long as she should remain unmarried; and that the court would enforce this charge against the real estate so devised, in the hands of the heirs of S. C. and purchasers and devisees of purchasers of the same from him.

BILL IN EQUITY to enforce against certain lands, in Warwick, being part of the homestead farm of John Clapp, late of said Warwick, deceased, a charge imposed thereon by his will, for the support and maintenance of the complainant so long as she should live, and remain unmarried.

By his last will and testament, dated the third day of September, 1817, and after his death duly proved, John Clapp, the father of the complainant, devised to his son, Silas Clapp, in fee, a certain part of his homestead farm, which he particularly described, "subject to the restrictions and incumbrances herein-

6	129
10	182
12	196
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6	129
23	181

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after pointed out and explained"; and by a subsequent clause in his will, declared as follows :—

"Item. My mind and will is, and I hereby declare the same, that provided my daughter, Anna Clapp shall, at any time hereafter, choose to live in the family of my son Silas Clapp, she shall have the right so to live; and the estate herein given to my said son Silas Clapp, shall be subject to that incumbrance during her life, or so long as she shall remain single or unmarried."

The bill was filed against the purchasers, and devisees of purchasers, of the estate of Silas Clapp, devised to him as above by the will of John Clapp, and against his heirs at law; and the case being heard upon bill and answer, it appeared from the answers, that in 1840, Silas built a house adjoining said estate, to which the complainant was in the habit of resorting and living with the family of said Silas whenever she pleased, up to the time of the death of said Silas, which took place on the 8th day of October, 1853, never making any further claim for support; but that since his death, the complainant had claimed compensation and allowance out of the estate so devised to said Silas as aforesaid. The question made was, whether, by the will of Jonathan Clapp, the estate devised to Silas was charged with the support of the complainant during her life and whilst she remained unmarried, or whether, all that was secured to her was a mere right to live in the family of Silas, which ceased upon his death, when his family was broken up.

The bill was originally filed in the county of Kent, but was by consent removed to the county of Providence and there heard.

Tillinghast & Bradley, for the complainants.

T. A. Jenckes, for the respondents.

Tillinghast & Bradley, for the complainant.

1. The clause of the will upon which this bill is founded clearly raises a trust in favor of the complainant. The testator has charged the land in express words. The property and the object are both certain, and in such case it is well settled that a trust is created. 2 Story, Eq. Juris. sec. 1068 a; *Harland*

v. *Trigg*, 1 Bro. Ch. Cas. 142; *Wynne v. Hawkins*, Id. 179; *Pierson v. Garnett*, 2 Bro. Ch. Cas. 38.

2. The land is bound by the trust in the hands of the respondents. 1 Story, Eq. Juris. sec. 395; Hill on Trustees, 398, (282).

T. A. Jenckes for the respondents.

1. The intention of the testator must be gathered from the whole will; and having, by other clauses in his will, made provision, by specific devises and bequests, for the support and maintenance of the complainant, the language of the clause on which she founds her claim cannot be construed into an intention on the part of the testator to make her support and maintenance a charge on that portion of the homestead estate devised to Silas Clapp. It is a universal principle in the construction of wills, that the *intention* of the testator is to govern whatever may be the language he may use. 1 Jarman on Wills, 315; *Bowley v. Sammon*, 3 H. & J. 4; *Moore v. Dudley*, 2 Stewart, 170; *Finley v. King*, 3 Peters, 346. And it is equally well established, that that intention is to be gathered from the whole will, and not from any parts or parcels thereof. 2 Jarman on Wills, 737-741; 2 Roper on Legacies, 1459, and cases there cited. It was clearly the intention of this testator to give each child the means of support. To this complainant, he left a provision as ample as his means and justice to his other children would allow. He left her one ninth of his farm and one seventh of his new dwelling-house. His object then, in this clause, must be explained by the context, and governed by the intent as gathered from the whole will. That intent being shown, any expression which, by itself, might be construed into an intent different from, or inconsistent with such general intent, will be rejected, or will be construed in accordance with the general intent. 1 Jarman on Wills, 411 and note; 2 Williams on Executors, 788; 2 Roper on Legacies, 1461-2, and cases there cited; see also *Hawley et al. v. Northampton*, 8 Mass. 37; *Cook v. Holmes*, 11 Mass. 530. It was the wish of the testator, although not expressed in such language as to make it an obligation on his devisees, that the estate should remain in the hands of his children. To Silas

he had given a large portion of his homestead estate, and wishing that his daughter Anna, the complainant, should have a home in his family, if she wished it, he directed that she should have the right to such a home, but with no intention that her support and maintenance should be a charge on the estate. The words "she shall have the right so to live," cannot be construed into any provision for a support for her, to be raised out of the estate devised to Silas Clapp. The complainant appears to contend that this clause created a trust in her favor. The words "she shall have the right so to live," and "I give the estate subject to that incumbrance," are not words creating an express trust. The trust, if any, must have been an implied one. It is a well-settled rule, applicable to real as well as personal estate, that where a trust is created by implication, it must be a necessary implication. 2 Roper on Legacies, 1496. To create a trust by implication, the words must be imperative, the subject and object certain. Hill on Trustees, 71; Jarman on Wills, ch. xii. *passim*. Are the words of this clause of such an imperative nature as to create a trust for the *support and maintenance* of this complainant? for it should be borne in mind that it is *support and maintenance* that she claims. But even if they did create a trust, did not that trust cease at the death of Silas Clapp? Can words so vague and indefinite as to the amount of her interest, be construed into a trust, which trust was to continue after the death of the head of the family in which the complainant was to live? Can the words "live in his family," be construed to mean a trust for support and maintenance *out* of that family?

2d. The proviso, that the complainant should choose to live in the family of Silas Clapp, was, in the nature of a condition precedent, the performance of which became impossible, on the death of said Silas; and having become impossible, the incumbrance on the estate was removed. By the terms of this clause, it is provided, that this complainant shall first choose to live in the family of her brother. The word family, may, according to the context, have different significations in different wills. Hill on Trustees, 78, citing Sir Wm. Grant in *Cruys v. Colman*, 9 Ves. 323. By the context, provision has been

made for this complainant; the object of this clause was to give her a home with her brother. It was not to extend beyond his life; and the word family, here, should be taken to mean the family of Silas Clapp while he remained its living head. By his death, the performance of this condition became impossible; and where a condition becomes impossible to be performed, no estate or interest vests. 1 Roper on Legacies, 755, citing Swinb. on Wills. Conditions precedent are such as must happen or be performed, before the estate can vest or be enlarged. And where the act is previous to any estate, or that act consists of several particulars, each must be performed. *Vanhorne v. Dorrance*, 2 Dall. 37. Even though a condition precedent becomes impossible, yet no estate or interest grows therefrom. 1 Jarman on Wills, (note) 797; see *Moakley v. Riggs*, 19 Johns, 71, 72; *Taylor v. Bullen*, 6 Cowen, 627. The complainant, therefore, must show that she chooses to live in the family of Silas Clapp, and that she is living there. This she cannot do; for, by the death of said Silas, the family, as that word should be construed in this will, ceased to be. She admits this in her bill; she admits that the family is scattered, and has no place of abode. By admitting this, she shows, in effect, that there is no family of Silas Clapp, and that there being none, the condition has become impossible, and the incumbrance removed. The performance of this condition was the motive, so to speak, which led the testator to make this clause part of his will. In such a case, the condition having become impossible, no estate can be taken. 1 Williams on Executors, 907.

3d. The portion of this clause making it necessary for this complainant to "choose to live in the family of Silas Clapp," and the subsequent portion making the estate "subject to that incumbrance during her natural life," are clearly repugnant and inconsistent with each other, and, taken together, have no intelligible meaning; the clause is uncertain, because of the indefinite quantity of the interest which the complainant is to take; such repugnancy, inconsistency, and uncertainty cannot be explained or aided by any other portions of the will, nor by the intention of the testator, as gathered from the whole will; and

the clause being thus repugnant, inconsistent, unintelligible, and uncertain, is void. The two portions of the clause taken together cannot be reconciled. They are absurd and unintelligible. They give to the complainant, provided she shall choose to live in her brother's family, the right so to do, and subject the estate to *that incumbrance*. What incumbrance? The choice of living in her brother's family, and the right so to live, are not words which can create a trust, charge an estate with maintenance or support, or evolve any meaning by which a testator's intention can be gathered, or that intention executed. See 1 Jarman on Wills, 414. *Bartlett v. King*, 12 Mass. 537. Repugnant words may be struck out as surplusage where the admission of a loose phrase would go to alter a large, plain, and particular disposition before expressed. *Green v. Amstead*, Hob. 65; *Countess of Bridgewater v. Duke of Bolton*, 5 Mod. 100, cited in note to *Holmes v. Craddock*, 3 Ves. Jr. 321. "The large, plain, and particular disposition" was the devise to Silas, and the provision for the complainant. And see, generally, as to cases where general intent will always control particular, and will set aside words or clauses manifestly interfering therewith, the authorities before cited. 1 Jarman on Wills, 411, note; 2 Williams on Executors, 788; 2 Roper on Legacies, 1461-2, and notes. The interest which the complainant was to take is so indefinitely expressed as to render the clause uncertain and doubtful, and therefore void. Indefiniteness of this kind makes void the clause containing it. 2 Jarman on Wills, 323; *Hoffman v. Hankey*, 3 M. and K. 376; Jones ex dem. *Henry v. Hancock*, 4 Dow. 145. The clause is as indefinite as in those cases in which the will gives a "handsome gratuity." *Jubber v. Jubber*, 9 Sim. 503. The right to live in a family, gives no interest whose amount or extent can be arrived at with any certainty. Even though the court might be satisfied as to the intent, yet where it is not sufficiently expressed to enable them to execute it, the clause must be considered void. See remarks of Master of Rolls in *Holmes v. Craddock*, 3 Ves. Jr. 319.

BOSWORTH, J. The question arises in this case on the language of a devise or provision in the will of John Clapp. The testator devises a portion of his homestead farm with the build-

ings and appurtenances thereof unto his son Silas Clapp, in fee, subject to the restrictions and incumbrances thereafter pointed out and explained. He then makes certain other devises and legacies, and inserts the following provision in his will, viz: "My mind and will is, and I hereby declare the same, that provided my daughter Anna Clapp shall, at any time hereafter, choose to live in the family of my son Silas Clapp, she shall have the right so to live, and the estate herein given to my said son Silas Clapp shall be subject to that incumbrance during her life, or so long as she shall remain single or unmarried."

It seems to us to be the plain intent of the testator to provide, by this language of his will, for the subsistence of his daughter Anna, and to make that subsistence a charge upon the estate which he had devised to his son Silas. This support is expressed to be for her life, or so long as she shall remain single and unmarried, and is dependent only upon the condition of her choosing to receive it.

This appears to be the plain intent of the testator, as apparent from the language of the will when he makes the devise to his son Silas, and when he makes provision for his daughter Anna. In the devise to Silas, he makes it subject to the restriction and incumbrance hereinafter pointed out and explained. When he makes the provision for his daughter Anna, he expressly charges it upon the estate devised to Silas, thus pointing out and explaining the incumbrance to which he had subjected the devise, and which was to be thereafter explained.

Now, the provision was, that she should have the right to live in his family; and can the words, "live in his family," be construed to mean a trust for support and maintenance out of that family? Silas Clapp has deceased, and his family are scattered and separated. The testator's language does not seem liable to be defeated by the happening of such events, for the estate is made chargeable with the incumbrance during the life, or until the marriage of Anna Clapp. If it could be defeated by the separation of the family of Silas Clapp, the bounty which the testator intended for his daughter during her life, or so long as she should remain single, would be dependent upon accident or upon the choice or caprice of Silas Clapp, whereas

the testator's language makes it dependent on her choice alone. The effect of the language, "right to live in his family," cannot, consistently with the apparent intent of the testator, be construed to limit the duration or extent of the testator's bounty; for independent of the consideration that this duration is fixed by the language of the testator, other considerations arise out of the nature of the incumbrance. Suppose, for instance, in the lifetime of Silas Clapp, and while his family was residing at the homestead, Anna Clapp had chosen to live in his family, and her application had been refused? Would not the right of resort to the premises charged have been clear? And is not the right to this resort equally clear when this right to live in the family is unattainable from any other circumstance, provided she chooses to enjoy the right?

It seems to us that the language of the will is sufficient to raise a trust for the subsistence of Anna Clapp. That trust is raised by the law of equity as an interest *in rem*. The provision of the will has both requisites to the raising of such a trust, viz: certainty as to the object of the trust, and certainty as to the subject of it. The object, was a living for Anna Clapp in the family of Silas Clapp, and the land devised to Silas, was the subject-matter out of which this living was to be furnished. Silas Clapp took the fee of the estate subject to this charge. If he satisfies the charge, the estate is discharged; if he does not, the estate remains charged, and the claim or right is to be satisfied out of it.

It seems to us that the language, "right to live in the family," is more indicative of the kind of support or quantum of benefit intended, than of the extent or duration of it. The object was to provide a living or home for the testator's daughter so long as she should live, or until she should attain a position in which that object would be otherwise answered. A living was to be provided — a living in the family of the testator's son Silas; and such support as she would have, by living in his family, is the measure or quantum of benefit intended. Nor does there seem to us any difficulty in ascertaining the amount of interest arising to Anna Clapp growing out of this charge upon the estate, with such certainty as will enable us to decree

the execution of the trust. It can be easily ascertained how much the support which she would receive by living in the family would cost; and that being ascertained, the extent of her interest is made certain, and can be enforced by a sale or rental of the land charged.

A decree must be entered declaring the real estate of the defendants, devised to Silas Clapp by the will of John Clapp, to be subject in their hands to the support of the complainant during her life, so long as she shall remain unmarried; and the case be sent to a master to ascertain the annual value of such support as was contemplated by said will, and in default of payment thereof, at the times and in the amounts to be reported by the master, said estate to be sold, &c. for the satisfaction of said charge.¹

¹ A similar case was decided about the same time by the court of appeals in Maryland, as appears by the following note of it furnished to me by my friend, Mr. Miller, the reporter:—

"A testatrix devised a *farm* to W. in fee, and then after giving some personal property to C. added: '*Item.* I do hereby will and direct that the said C. *shall have a home* during her natural life *on the farm* hereinbefore bequeathed to W.' *Held:*

"1st. That this devise of a '*home*' is not void for *uncertainty*, nor is it confined to a mere *room* and *shelter* in the house on the farm, but extends to the *board* and *maintenance* of the devisee and is a *charge* upon the land therefor.

"2d. The sum to be awarded the devisee, as an annuity chargeable on the land, must bear a proper relation to the product of the latter; the standard of her right is the *value* of the *home*, as she was habituated to it in the house of the testatrix.

"3d. In estimating this sum, regard must be had to the *manner* and *mode* of life of the devisee up to the death of the testatrix, the relative situation of the parties, according to the position they maintain in society, the condition and habits of life of the testatrix and the devisee, the extent of the estate, the mode of living of the parties, so far as expensiveness or economy is concerned, and the practice and habits of the persons with whom they associate. *Willett & Wife v. Carroll*, 18 Md. Rep. 459.—REPORTER.

Kimball v. Lockwood & Smith.

RUFUS W. KIMBALL v. LOCKWOOD & SMITH.

Tenants of the mortgagor under a lease executed subsequently to the mortgage, by promising to pay, and paying rent, to the mortgagee under a forfeited mortgage, disentitle the mortgagor from recovering the same from them; they becoming thereby, through attornment, the tenants of the mortgagee.

DEBT for rent of a shop in High Street, Providence, wherein the plaintiff claimed \$150, for the last three quarters of the year elapsing between March 1, 1858 and March 1, 1859, under a lease parol by him made to the defendants.

The case was submitted to the court, under the general issue, in fact and law; and it appeared, that the late Henry Matthewson, being the owner of the leased premises, in his lifetime, mortgaged them in fee to his son, Henry C. Matthewson, and, upon his death, they, with other real estate, came into the possession of the plaintiff, whose wife was one of said Matthewson's heirs at law; that being thus in possession, the plaintiff leased the shop in question to the defendants, by parol, from March 1, 1858 to March 1, 1859, at the rent of \$200 for the year, payable quarterly; that after the death of his father, the son's mortgage having become due, on the 13th day of May, 1858, he sued the plaintiff in ejectment to recover possession of the estate of which the shop in question was a tenement, and gave notice to the defendants to pay their rent to him as mortgagee; that the defendants, having offered, under the advice of counsel, to pay rent to the plaintiff if he would give them a bond of indemnity against the claim of the mortgagee, which he did not do, promised the mortgagee to pay the rent to him, and did pay to him the last three quarters rent, accruing from the first day of June, 1858, to the first day of March, 1859, under a bond of indemnity from the mortgagee against the claim of the plaintiff, to recover which rent, after such payment, this action was brought. The rent of the quarter, during which notice was given by the mortgagee to the defendants to pay the rent to him, was paid by them to the plaintiff.

James Tillinghast, for the plaintiff, cited *Evans v. Elliot*, 9 Ad. & Ell 392; *Field v. Swan*, 10 Met. 112.

B. N. Lapham, with whom was *Wm. H. Potter*, cited *Morse v. Gallimore, et al.*, Doug. 279; *Keech v. Hall*, Ib. 21; *Birch v. Wright*, 1 T. R. 378; *Pope v. Briggs*, 9 B. & C. 245; *Babcock v. Kennedy*, 1 Vt. 457; *Stone v. Patterson*, 19 Pick. 476; *Jones v. Clark*, 20 Johns. 51.

AMES, C. J. It seems to be clear, upon principle, and is well settled by authority, that a mortgage by the lessor of lands under lease, operating as an assignment, *pro tanto*, of the reversion, carries the rent as incident to it, to the mortgagee. In such case, therefore, all that the law requires of the mortgagee to entitle him to rent of the tenant of the mortgagor, is notice to the tenant to pay the rent to him; such notice preventing any injustice to the tenant from double payment.

If, on the other hand, the lease be subsequent to the mortgage, as the mortgage gives to the mortgagee no title to the reversion out of which the lease was granted, he cannot, by mere notice, compel the tenant to pay rent to him, nor does his title to the rent accrue until he has obtained possession of the mortgaged estate. He is not the landlord of the mortgagor, nor, by virtue of the relation between them, entitled to the rents and profits of the mortgaged estate, as long as the mortgagor retains possession. *Evans v. Elliot*, 9 Ad. & Ell. 159; *The Manchester Hospital and Life Ins. Co. v. Wilson*, 10 Met. 126.

The mortgage, however, conveys the title to possession to the mortgagee, and, indeed, when, as in this case, forfeited, the whole title at law; and, unless some statute forbid, which none here does, the tenant of the mortgagor may attorn to the mortgagee, and by thus placing him in possession of the mortgaged premises, entitle him to the rents thereof. There is no disloyalty to his landlord in such attornment by the tenant; since, thereby, he only recognizes a title which his landlord has granted. *Jones v. Clark*, 20 Johns. 51. In *Evans v. Elliot*, supra, Lord Denman seems to agree that the tenant's attornment will create a privity between himself and the mortgagee, or, as he expresses it, "is at least necessary" to create the relation of tenant and landlord between them; although he decides, that the attornment will not relate back to a notice

 Fenner v. Manchester & others.

before given by the mortgagee to the tenant, but creates the privity and right to rent only from the time when it is actually made. As attornment is nothing more than the consent of the tenant to the grant of the seignory, or, in other words, to become tenant of the new lord, (Co. Lit. 309 *a*; Butler's note, 272,) and the tenants in this case, by promising to pay, and actually paying the rent to the mortgagee, thus attorned to, and became tenants to him, it follows, that they rightfully paid to him the subsequently accruing rent, and cannot be compelled to pay it over again to the plaintiff. Judgment must therefore, be rendered for the defendants, for their costs.

6	140
18	668
6	140
22	894
6	140
25	882

HENRY & RICHARD FENNER, Executors, v. EDWIN F. MANCHESTER & others, Heirs at law of ISRAEL G. MANCHESTER.

Heirs at law, in whose hands the real assets of their ancestor are pursued for his debts, may set up the bar of the statute of limitations; nor is it any answer to a plea of the statute, in such case, that the creditor was one of the administrators of the estate of the ancestor, which was represented insolvent; since the creditor might have presented his claim to the commissioners for examination and allowance.

ASSUMPSIT against the defendants, as the heirs at law of the late Israel G. Manchester, of Providence, to recover out of the real assets inherited by them from him, the amount of a promissory note, given by said Israel, in his lifetime, to Welcome Fenner, the testator of the plaintiffs. The note declared on was for three hundred and fifty dollars, payable on demand, with interest, and was dated the sixth day of November, 1847. The writ was served by attaching the real estate inherited by the defendants from said Israel G. and was dated the sixth day of March, 1859.

The defendants pleaded the statute of limitations in both forms, and the general issue. The plaintiffs joined in the general issue, and to the pleas of the statute replied, in substance, that before the expiration of six years next after the accruing of their cause of action, to wit: on the 3d day of February,

Fenner v. Manchester & others.

1852, the said Israel died, and before the expiration of said six years, the testator of the plaintiffs, together with one of the defendants, was duly appointed and qualified to administer his estate, and continued to be such administrator from the 9th day of March, 1852, until his decease, on the 8th day of November, 1854; and that at the time of the death of their said testator, the estate of said Israel was not fully administered, but remained open for further administration and settlement.

To this replication the defendants, in substance, rejoined, that said Welcome Fenner, with his co-administrator upon the estate of said Israel, soon after their appointment, represented the same to be insolvent; that commissioners were appointed and qualified to receive and examine the claims against it, six months being allowed for that purpose; that due notice was given by said commissioners to bring in their claims against the estate of said Israel on or before the 23d day of September, 1852; but that neither the said Welcome Fenner, in his lifetime, nor the plaintiffs, his executors after his death, ever presented their said claim for allowance.

To this rejoinder the plaintiffs demurred, severally.

Currey, for the plaintiffs.

I. Replication, that plaintiffs' testator was administrator of the estate of defendants' ancestor, is a sufficient answer to the plea of the statute of limitations.

An administrator cannot sue himself, nor his co-administrator;—therefore, the statute is no bar. 2 Wms. Ex'rs, 810; Same, 902; *Steinham v. Saunders*, 14 S. & R. 357; *Chapman v. Turner*, 11 Viner's Abr. 72.

II. Where the characters of administrator and creditor unite in the same person, the rights of such person as creditor are not affected by the statute of limitations. Because,

1. There is, in such case, no person to plead the statute.
2. There is no person *for* or *against* whom the statute can run.
3. There is no person to bring suit. *Vainden v. Bell*, 3 Rand. 448; *Knight v. Godbolt*, 7 Ala. 304; *Chapman v. Turner*, 11 Viner's Ab. 72.

III. Defendants' rejoinder does not answer the plaintiffs' replication. Because,

1st. It does not show or allege a retainer by plaintiffs' testator of effects of the administration estate to pay this debt.

2d. It does not show or allege, that the disability of being administrator was removed, so that suit could have been commenced before the debt was barred by the statute.

3d. It does not traverse the allegation, that the administration estate was unsettled at the death of the plaintiffs' testator.

IV. As the plaintiffs' testator, had he lived to settle up the estate, would have had a right to retain assets sufficient to pay this note, the remedy of his executors against the same estate for the same debt must be clear. 2 Wms. Executors, 901; *Vainden v. Bell*, 3 Rand. 448.

B. N. Lapham, for the defendants.

The act entitled, "An act for the distribution of insolvent estates," (Dig. 1844, p. 255,) provides for the presentment of all claims against an insolvent estate of a deceased person to the commissioners thereon, and the act in amendment, (Supplement to Dig. of 1844, p. 711,) gives an appeal in such cases. The testator, or his representatives, could have presented his claim for allowance to the commissioners, which would have been equivalent to the commencement of an action. His appointment as administrator of the defendants' intestate, is not equivalent to a new promise by the latter, nor will it renew the claim against his estate. Angell on Lim. sects. 265-267; 1 Greenleaf's Evid. sect. 176, and cases cited, and see *Richmond, Adm'r, Petitioner*, 2 Pick. 567.

Statutes of limitation exist quite as much for the benefit of estates of deceased persons, as for living persons, *Pratt, et al. v. Northam, et al.* 5 Mason, 95; *Atwood v. Rhode Island Agricultural Bank*, 2 R. I. Rep. 196; and chapter 161, of the Revised Statutes, making the estates of decedents liable for their debts in the hands of heirs, does not take the actions against such out of the statute of limitations. *Richmond, Adm'r, petitioner*, 2 Pick. 567; *Mooers v. White*, 6 Johns. Ch. Rep. 360; 2 Alabama, 660.

BOSWORTH, J. The replication seeks to avoid the plea of the statute of limitations, by setting up a disability of the plaintiffs' testator to sue or prosecute his demand, after the time when he

took administration on the estate of Israel G. Manchester. He could not sue himself. Six years had not expired from the date of the note, or, from the time when the note was payable, to the time when Welcome Fenner became the legal representative of the debtor. But although the administrator might not bring a suit for his claim, the statute authorizes him to present and prosecute his claim before the commissioners; and to avoid the difficulty of prosecuting his claim, which would be presented in the ordinary courts of common law, provision is made, that if any creditor entitled to distribution of the assets of an insolvent estate is dissatisfied with the allowance of a claim by the commissioners, presented by the administrator in his own behalf, he may appeal from such allowance, and litigate the same in the supreme court. The administrator can assert his claim in this mode, and is under no disability, in the case of an insolvent estate. He may assert his claim in the same manner as other creditors. There being no disability, we do not see why the positive provisions of the statute of limitations should not be operative, and applicable to this case as or to any other, and, therefore, the demurrer must be overruled.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT

FOR THE

COUNTY OF WASHINGTON, AUGUST TERM, 1859,
AT SOUTH KINGSTOWN.

PRESENT:

HON. SAMUEL AMES, CHIEF JUSTICE.

HON. GEORGE A. BRAYTON, }
HON. ALFRED BOSWORTH, } JUSTICES.

JOSEPH CRANDALL v. WILLIAM JAMES & others.

Trespass is the proper form of action to be brought against the trustees of a school district, by one, against whom they have illegally assessed and ordered to be collected, a school tax.

Upon the trial of such an action, the decision of the school commissioner and a justice of the supreme court, upon appeal, under ch. 68, sects. 1 and 2, that a tax has been illegally assessed, is conclusive, both in law and fact, upon the parties to the appeal, as to that question; and this construction of the statute does not bring it into conflict with sect. 15, art. 1, of the constitution, which declares, that "the right of trial by jury shall remain inviolate."

TRESPASS against the defendants as trustees of school district, No. 2, in the town of Exeter, for unlawfully assessing a tax upon the plaintiff's property within said district, and issuing to the district collector a warrant therefore, upon which he took and sold the plaintiff's cow.

At the trial of the case, under the general issue at the May term, 1859, of the court of common pleas for the county of

Washington, before Mr. Justice Shearman, with a jury — the plaintiff offered in support of the action, the statement of facts and decision of the commissioner of public schools — confirmed by the chief justice of the supreme court, in an appeal of the plaintiff, to the commissioner, from the action of the defendant trustees in the matter of assessing a tax upon the plaintiff's property within said district, by which it appeared and was decided, that said tax was illegally assessed. The defendants objected that the plaintiff's remedy, if any, was in case and not trespass, and offered evidence to prove that the statement of facts laid by the commissioner before the chief justice for his decision was erroneous, and the decision based thereon, wrong. The court, however, overruled the objection, and excluded the evidence offered; holding, as to the latter, that the decision upon the appeal to the commissioner was conclusive of the illegality of the assessment; whereupon a verdict having been rendered for the plaintiff, the defendants excepted to the above rulings as erroneous in matter of law, and brought their exceptions to this court for decision.

W. Updike and Dixon for the defendants.

1st. The action should have been case and not trespass; the injury to the plaintiff being consequential only upon the act of the defendants.

2d. By ch. 68, sects. 1 and 2 of the Revised Statutes, it is the decision of a judge of the supreme court, upon the statement of facts of the commissioner which is conclusive, and not the statement of the commissioner, which was what we offered to impeach by testimony.

3d. So construed, the above sections are valid; but if the statement of facts of the commissioner was designed to be made conclusive, then the sections are unconstitutional and void, inasmuch as they are in conflict with the right of trial by jury.

E. R. Potter for the plaintiff.

1st. The decision of the school commissioner, under chap. 68, § 1, of the Revised Statutes, is final, unless the parties request him to lay the case before one of the judges. The power

to *decide* the case implies a final decision, unless some mode of appeal is given by law.

2d. The claim of the defendants, to be allowed to show that the commissioner made a mistake as to the evidence on which he gave his decision, is inadmissible. If a right is admitted to question the decision of any legal tribunal on that ground, there would be no end to litigation.

3d. The law giving the commissioner the power to decide such cases is not unconstitutional, although it provides no trial by jury. The provision in the constitution of the United States has no reference whatever to cases of state legislation. By the provision of the Rhode Island constitution, no person is to be deprived of life, liberty, or property, "except by the judgment of his peers, or *the law of the land*." (Art. 1, § 10, Rev. Sts. p. 19.)

4th. The phrase, *law of the land*, (*lex terræ*,) has a settled meaning. It was adopted into our constitution from *Magna Charta*. In that it was intended to designate the *known* and *common* law and usages of the people, in opposition to the civil law, which was attempted to be introduced, and to other codes of law. It meant the law of England. 1 Black. Com. 67, and Chitty's note; Hargrave's Coke, p. 11. The phrase is copied into our constitution from our ancient Bill of Rights. The Rhode Island Code of 1647 provided, that no person should be deprived of his lands or liberties, "but by the lawful judgment of his peers, or by *some known law*, and according to the letter of it."

We may therefore assume, that in our legislation, the phrase has always been used as intending that every case should be judged by *known and general* laws, in opposition to special legislation, and perhaps also, in opposition to an equity system, against which there was *anciently* a strong prejudice in this state. See also 1 Kent Com., 8th ed. 612, top, and notes; 4 Wheaton, 580. Even if this is not the meaning of the phrase, still it might be contended that being adopted from the old common-law times, it could only be construed to extend to cases, and classes of cases, known to the ancient common law; and the school law provides for an entirely new class of cases. The case of flowage laws and railroad charters may be of

doubtful application here, because there the property is taken under *pretence* of the right of eminent domain.

5th. Even if the defendants had a right to trial by jury, by submitting to the jurisdiction without protest, they are concluded.

6th. As to the action. The taking the property was a trespass. The plaintiff had no remedy against the collector, because his warrant was, upon its face, regular, and was his justification. His only remedy is against the trustees, or assessors. They had jurisdiction of the subject matter; they had the right to lay the tax; but they did not comply with the forms of law. It is similar to the case of an inferior court exceeding its jurisdiction. It is the case of a magistrate issuing a void warrant; and the action must be trespass. 1 Chitty's Pleadings, 213, and cases there cited; *Withington v. Eveleth*, 7 Pick. 106. All persons who direct or order the commission of a trespass are principals. See instances and cases. 1 Chitty's Pleadings, 91.

7th. Even if the action is wrong, it is a defect apparent upon the face of the declaration, and should have been demurred to, or pleaded in abatement; and after pleading to the merits and a verdict, and after the costs of the suit are incurred, the plaintiff ought not to be nonsuited. 1 Chitty's Pleadings, 226, 488. And see 5 Mass. 558; 7 Mass. 237, 547; 13 Mass. 282; 16 Mass. 213; 1 Pick. 109, 482.

AMES, C. J. The first exception taken in this case, which supposes that the court below erred, in holding the action of trespass to be appropriate to it, cannot be maintained. The law, for the sake of the remedy, regards those who under color of office do, or order to be done, that which their authority does not warrant, as mere wrongdoers; and if the act be forcible, such as the arrest of a person, or the taking and carrying away of his property, as co-trespassers; in which relation all that take part in the forcible act, either as advisers or actors, are principals. Upon the supposition, therefore, that the defendants illegally assessed the school tax, which under their warrant was levied upon the property of the plaintiff, trespass, and not case, is the proper form of action for his redress.

Agry v. Young, 11 Mass: 220; *Freeman v. Kennedy*, 15 Pick. 44.

The remaining exception, that the court below erred in holding the decision of the commissioner and judge to be conclusive that the assessment was void, is equally untenable. The decision of the commissioner is conclusive from the very nature and purpose of his jurisdiction. It was designed, that as visitor under the public school system, he should summarily, cheaply and finally settle disputes arising in the great academic body created by the state, as the visitors of similar institutions, both in England and in this country, are accustomed to do. At the request of the defendants his judgment, embodying a statement of the facts, was laid before a justice of the supreme court for his decision; and the statute especially declares, that his decision shall be final. For all the purposes of such an enactment, it would be idle to make the decision of the justice conclusive, unless the statement of facts, deduced by the commissioner from the evidence before him, were also conclusive.

Nor is this construction of the statute, as contended, liable to the objection that it creates a conflict between the statute and sect. 5, art. 1, of the constitution, which declares, that "the right of trial by jury shall remain inviolate." The summary jurisdiction of visitors of academic bodies, nay, summary modes of passing upon the acts of officials engaged in the assessment and collection of taxes, were, at the adoption of the constitution, as well known in this state and in all other countries of the common law, as the equity, admiralty, and probate jurisdictions; and are as little liable as those, to the objection that they infringe the right of trial by jury. All these special jurisdictions have for ages, each in its appropriate sphere and in its distinctive method, administered justice side by side with the common-law courts; and in so doing, have never been supposed to encroach upon the rights of trial appropriate to common law cases, as these rights have been understood and interpreted. The result is, that the court below correctly held the defendants to be bound by the proceedings before the commissioner and judge, to which they and the plaintiff were parties; and that if after those proceedings they chose to go on and col-

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lect a tax thus decided to be unlawful, they were liable as trespassers, with the right only to have the jury assess the plaintiff's damages. Both the exceptions brought before us by the defendants must therefore be overruled, and the court of common pleas ordered to render judgment for the plaintiff upon the verdict.

EXETER v. RICHMOND.

A wife follows the settlement of her husband, whether it be in this state or in any of the United States, and thereby loses her former settlement in a town of this state; and if she afterwards return to this state, cannot, by virtue of ch. 51, sect. 13, of the Revised Statutes, be removed as a pauper, to the town of her former settlement in this state, — that not being the town to which she belongs, or in which she was last legally settled.

APPEAL from an order of the town council of the town of Richmond, ordering the removal of one Sally Bray and her infant to the town of Exeter, as paupers chargeable to said town.

The appeal was submitted to the court upon the following agreed statement of facts: "It is admitted that the last legal place of settlement of the paupers, in this state, was in Exeter; that Lyman Rathbun, the first husband of the pauper, Sally Bray, purchased a tract of land in Sterling, Connecticut, on the 26th day of March, 1838, of the value of about \$1088, and held the same unencumbered for four years, the deed being recorded; that he lived thereon for three years; was, on the 29th day of March, 1841, admitted an elector of the state of Connecticut in said town of Sterling, and as such, took the oath required by law; and the respondent claims, that by the statutes of Connecticut, the said Rathbun gained a settlement in said Sterling, and that his widow should have been removed, if at all, to that town, and not to Exeter. It is further admitted, that after the decease of said Rathbun, his widow, Sally, married ——— Bray, an alien, who had no legal settlement in the United States."

E. R. Potter, for the town of Exeter.

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Chapter 51, § 13, of the Revised Statutes, cannot be intended to mean, that a pauper shall be removed to the town in this state where he was last settled, irrespective of any later settlement he may have gained in another state. Because,—

1st. It is contrary to the whole spirit of the pauper laws. They contemplate the pauper's gaining a settlement in another state as well as in this. (See cases of wife and child; Rev. Stats. ch. 49, § 1, pp. 1 & 2.) And a settlement here remains only until a new one is gained, without reference to where the new one is; and after gaining a new one in this, or another state, the old one is lost. Rev. Stats. ch. 49, § 2. In this case the wife followed the settlement of her husband, and now belongs to Sterling and not to Exeter.

2d. This case does not come within either of the provisions of ch. 51, § 13, of the Rev. Stats. The pauper did not *lawfully belong* in Exeter, nor was he *last legally settled* in Exeter. It is admitted he was last legally settled in Sterling.

3d. The case has been substantially decided in *W. Greenwich v. Warwick*, 4 R. I. Reports, 136; although this does not appear from the report to have been the exact question there controverted.

Dixon, for the town of Richmond.

The pauper was found in Richmond, and her last place of settlement in this state, was Exeter. By the express direction of the 13th section of ch. 51, of the Revised Statutes, she was to be removed to her last place of legal settlement within the state. Richmond complied with the statute by sending her to Exeter; and, if she had acquired a settlement in Sterling, Connecticut, Exeter could have sent her there.

AMES, C. J. It is not questioned that Lyman Rathbun, the first husband of Sally Bray, the pauper, became, by residence and ownership of real estate in Sterling, Connecticut, a settled inhabitant of that town. As by the first rule of our canons of settlement, it is provided, that "a married woman shall always follow and have the settlement of her husband, if he has any settlement in this state, or in any other of the United States," the pauper lost her settlement in Exeter, and gained, in lieu of it, a settlement with her husband in Sterling, Connecticut. Rev.

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Stats. ch. 49, sect. 1, Rule 1st. The pauper had thus lost her settlement in Exeter, and the town council of Richmond had no more right to remove her thither than to any other town in the state.

It is a mistake to suppose that the 13th section of ch. 51 of the Revised Statutes, qualifies this result, by providing, that the pauper may be removed by the town to which he has become, or is likely to become chargeable, to the town to which "he lawfully belongs *within this state*, or in which he was last legally settled." This section, together with the sections immediately preceding and following it, prescribe the proceedings for the removal of paupers and the remedy for towns aggrieved by such removal; and, as the statute is necessarily confined in its operation to our own territory, the right of removal, under the statute, is very properly limited, by the language of the 13th section, to a removal to a town within this state. It must, nevertheless, by the same language, be the town to which the pauper "lawfully belongs," "or, in which he was last legally settled." As by the statement of facts submitted to us, it is apparent that this was not the town of Exeter, but of Sterling, Connecticut, a decree must be entered reversing the order of removal of the town of Richmond, with an allowance to the town of Exeter for all proper costs and charges consequent upon the order and its reversal.



STANTON CLARKE & WIFE v. MARY ANN BURDICK, Executrix.

A bequest of money to a married woman, charged by the will upon lands of the husband mortgaged to the testator, by the terms of which bequest the interest of the sum is to go to her during her life, and the property to her children, at her decease, does not entitle her to receive the principal sum; but the same should, no trustee being named in the will, be retained by the executrix to enable her to carry out the directions of the testator.

ASSUMPSIT, by husband and wife, against an executrix, to recover a legacy of \$500, claimed to be due to the wife under the will of the defendant's testator.

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The case was submitted to the court upon the following agreed statement of facts :

"Daniel Burdick, by his will, made May 17, 1856, and proved February 8, 1858, provided, —

Fifth, I give to my niece, Mrs. Maria Antoinette Clarke, wife of Stanton Clarke, the sum of five hundred dollars ; and it is my will that this bequest shall be a permanent lien upon the real estate which was mortgaged to me by the said Stanton Clarke, and of which I have legal possession, so that the interest of said bequest shall go to my said niece, during her life, and that the property thus bequeathed shall go to her children at her decease." The plaintiffs claim the payment of the legacy to them forthwith. The defendant contends that she is only bound to pay the annual interest to said Maria, and that the principal should not be paid over unless under a decree of a court of equity securing it to the purposes of the will.

It is admitted that Daniel Burdick held mortgages on land in Westerly from said Stanton Clarke, which is the land intended in the will, but was not in possession thereof ; and that the executrix has sued those mortgages.

N. F. Dixon, for the plaintiffs, contended, that the plaintiffs were entitled to recover the legacy, for the purpose of enabling them to pay, *pro tanto*, the mortgages which had been sued, and upon the land mentioned in which the legacy had been charged.

E. R. Potter, for the defendant, insisted, that the defendant was bound, as executrix, to keep possession of the amount bequeathed, in order that she might pay over the interest to the niece for life, and the principal to the children of the niece at her death, according to the directions of the will.

AMES, C. J. The claim of the plaintiffs to recover the amount of this legacy, that thereby they might pay with it, *pro tanto*, the mortgages upon the land of the husband upon which it is a lien, would, if admitted, defeat the whole purpose of the testator. His notion evidently was, that the mortgages never would be paid ; and he therefore charges upon the land mentioned in them, and which he declares, though it seems by mistake, to be in his possession, this legacy, as "a *permanent lien*" thereon. His evident intent was, to secure upon the

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husband's property this provision for the wife, his niece, and for her children ; "so," as he expresses it, "that the *interest* of said bequest shall go to my said niece during her life, and that the *property* thus bequeathed shall go to her children at her decease." Language cannot be conceived more expressive of a design that the niece should receive only the interest of the legacy whilst she lived, and that the capital should be secured and paid over to her children when she died. As no trustee is interposed by the will, this duty must be performed by the executrix ; and the possession of the fund is necessary to enable her to perform it.

Judgment must therefore be entered for the defendant for her costs.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

FOR THE

COUNTY OF NEWPORT, AUGUST TERM, 1859,
AT NEWPORT.

PRESENT :

HON. SAMUEL AMES, CHIEF JUSTICE.
HON. GEORGE A. BRAYTON, } JUSTICES.
HON. ALFRED BOSWORTH, }

THE NEW ENGLAND COMMERCIAL BANK v. THE STOCKHOLDERS
OF THE NEWPORT STEAM FACTORY.

JOSIAH S. MONROE v. THE SAME.

The charter of a manufacturing corporation provided, that "all executions that shall issue against said corporation shall be levied on the property of said corporation; and for want of such property, the stockholders who were such at the time the contract was made, or liability incurred, shall be liable in their own persons and estates, as if the contract had been made or liability incurred by them personally. Stockholders shall be holden as such, for all debts and liabilities incurred up to the time of the sale or disposal of their stock, and public notice thereof given in a newspaper printed in Newport." *Held*, that a judgment creditor of the corporation, whose execution had been returned wholly unsatisfied for want of corporate property whereon to levy the same, might maintain, for the recovery of his debt, against the living stockholders of the corporation liable to him, an action at law, as against joint contractors for the same, in the nature of co-partners, and that this, in such a contingency, was his appropriate remedy; the stockholders who might be compelled to pay the debt having, under another clause of the charter, a remedy over against the corporation for the amount so paid, and against the other stockholders liable for the debt, for what they might pay over and above their just proportion of the same.

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Held, further, that this liability for the corporate debts, upon the death of a stockholder, did not, at law, survive against his estate, and that no action at law could be maintained against the personal representative of such stockholder, to enforce the same; but that the estate of a deceased stockholder might be pursued by the creditor in equity, which, for the sake of the remedy, and to correct the form of the contract so as to carry out its substance, would construe it to be several as well as joint; that in such case a court of equity would decree in favor of the creditor of the corporation, an account of the personal estate of a deceased stockholder, and payment of his debt out of the surplus of the same, after the payment of the separate debts of such stockholder and of the expenses of settling his estate, without regard to the solvency or insolvency of the stockholders liable, and without reference to the state of accounts between the stockholders and the corporation; leaving the estate to seek repayment from the corporation, or contribution from those liable to it.

Held, also, that to a bill seeking such relief from the estate of a deceased stockholder, all the living stockholders and representatives of deceased stockholders, liable to the debt, must, as interested in the account to be taken, be made parties defendant to the bill; that if the real assets of the deceased stockholder are sought to be charged, his heirs at law, in case of intestacy, and his devisees, if there be a will, must also be made parties defendant to the bill; that, as two or more creditors for whose claims different sets of stockholders are liable cannot unite them all in the same bill, for the purpose of separate relief against those respectively liable to them, so the same creditor cannot enforce in the same bill, against the estates of deceased stockholders, different debts, for which all the estates pursued are not liable; but that there is no objection, on the ground of multifariousness, to a creditor's seeking, in the same bill, relief out of the estates of two or more deceased stockholders, all of which are liable to his debt.

It, after the retiring of a stockholder from the corporation, by the sale of his stock, and due public notice thereof, as required by the charter, the creditor gives up old notes, upon which the stockholder was liable, and takes new ones, especially if done for the purpose of absolving him from liability, and imposing it upon his successor in the stock, this operates as a complete release to him of the debt, both at law and in equity.

By force of sect. 8, ch. 161, and sect. 9, ch. 177, of the Rev. Stats. a suit in equity cannot be maintained against the executor of a deceased stockholder, for the payment of a corporate debt out of the personal assets of the testator, after the lapse of three years from the required publication by the executor of notice of his appointment and qualification to act for the estate in that capacity; the policy of these enactments being, to enable the speedy settlement of the estates of the dead.

THESE were actions at law and bills in equity brought by certain creditors of the Newport Steam Factory, an insolvent manufacturing corporation, for the purpose of enforcing their debts against the surviving, and the estates of the deceased, corporators, under the personal liability clause of the charter of the corporation, and were submitted to the court together, upon written arguments.

It appeared, that the Newport Steam Factory was incorporated by the General Assembly, for the purpose of manufacturing by steam power, at the June session, 1831; its capital, divided into sixteen shares, not to exceed two hundred thousand

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dollars ; the shares liable to be sold for the non-payment of any assessment, but the stockholders not to be personally liable to the corporation for any assessment in their stock beyond the sum of three thousand dollars on each share.

The eighth and ninth sections of the charter, as it was originally granted, were as follows :

"Sect. 8. And be it further enacted, that in all proceedings, whether in law or equity, in which said corporation shall be a party, the leaving an attested copy of the writ or summons, or other process, with the clerk or agent of the company at their usual place of business, shall be deemed a sufficient service thereof; and all executions that shall be issued against said corporation may be levied on the property of said corporation, and for want of sufficient property of said corporation, the stockholders, who were such at the time the debt was created or the contract entered into, shall be liable in their estates and persons for the payment thereof in the same manner as if said debt had been incurred or contract entered into by such stockholder personally; and any person having causes of action against said corporation, may, at his election, commence his action in the first instance against the stockholders in said corporation, who were such at the time the debt was contracted, contract entered into, or liability incurred, in the same manner as if they were co-partners, not incorporated; and that each and every of the stockholders in said corporation shall be liable as co-partners therein in the same manner and to the same extent as if they were corporators in any unincorporated manufacturing or commercial company.

"Sect. 9. And be it further enacted, that if the individual property of any stockholder or stockholders shall be sold for the payment of the debt of the corporation, or, if any individual stockholder or stockholders shall be compelled to pay such debt, or any greater proportion thereof than such stockholder or stockholders' proportion of said debt, according to the stock held by him or them in the capital stock of said corporation, then such stockholder or stockholders shall be entitled to an action, in his, her, or their name or names, against said corporation for the recovery of the amount so paid ; or, such stockholder or stock-

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holders shall have his, her, or their action on the case against the other stockholders for the amount so paid over and above his, her, or their proportion of such debt."

At the January session of the General Assembly, 1840, the then stockholders of the company presented their petition to the assembly, in which, after reciting that by the eighth section of the act incorporating them, it was provided, that suits for debts due from the corporation may be, in the first instance, commenced against the individual stockholders as though they had not been incorporated, and that said act differed, in this respect, from other charters granted by the assembly, both before and since, to other companies of manufacturers, they pray, that inasmuch as said eighth section may cause great inconvenience to the individual stockholders of the corporation, and afford no greater security to the public for the payment of the debts due from the corporation, said eighth section may be repealed, and the charter amended by inserting in place of the same the amendment by them presented.

The amendment presented, and which was passed by the General Assembly, was as follows :—

"An act in amendment of an act entitled an act to incorporate the Newport Steam Factory.

"Be it enacted by the General Assembly as follows :—

"Sect. 1. The eighth section of said act be, and the same is hereby, repealed.

"Sect. 2. In all proceedings, whether in law or equity, in which said corporation shall be a party, the leaving an attested copy of the writ or summons with the clerk or treasurer at his usual place of business, shall be deemed a sufficient service thereof; and all executions that shall issue against said corporation shall be levied on the property of said corporation; and for want of such property, the stockholders who were such at the time the contract was made, or liability incurred, shall be liable in their own persons and estates, as if the contract had been made, or liability incurred by them personally. Stockholders shall be holden as such for all debts and liabilities incurred up to the time of the sale or disposal of their stock,

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and public notice thereof given in a newspaper printed in Newport."

On the 15th day of February, 1858, the Newport Steam Factory, being insolvent, and largely indebted to the New England Commercial Bank of Newport, and to Josiah S. Munroe, made an assignment to Seth W. Macy of all their real estate, for the equal benefit of all their creditors, which trust was accepted by Macy, and so far executed that he has realized about \$16,000 gross proceeds from the sale of the assigned property, and has on hand some portion of it unsold. At the February term of the supreme court for the county of Newport, 1858, the New England Commercial Bank recovered two judgments against the Newport Steam Factory, one, for the sum of nineteen thousand four hundred and ninety-nine dollars, debt and costs, being for the amount of four promissory notes made by the company to the bank on the 3d day of February, 1852, upon which interest had been paid up to July 1, 1857; and the other, for the sum of seventeen thousand, eight hundred and seventy-seven dollars, debt and costs, being for drafts discounted by the bank for the company, between the latter parts of the months of March and August, 1857. Executions issued upon the judgments and were delivered to the sheriff of Newport county, who, on the 30th day of July, 1858, returned them wholly unsatisfied, being able to find neither goods nor chattels, nor real estate of the company upon which to levy the same.

Another creditor of the company, Josiah S. Munroe, also recovered two judgments against the company: one, at the April term of the court of common pleas for the county of Newport, 1858, for the sum of \$3,596.65 debt, and \$6.66 costs, and the other, at the August term of the supreme court, for the county of Newport, for the sum of \$7,050.93 debts, and \$11.35 costs. Upon both these judgments executions issued, were delivered to the sheriff of the county of Newport, and were returned by him unsatisfied, for want of any estate of the company to be found by him within his precinct.

The actions at law and suits in equity, which were now submitted to the court, were severally brought, in the county of

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Newport, by the New England Commercial Bank, and by Josiah S. Munroe, to enforce their respective judgments against such living stockholders of the Newport Steam Factory, and the estates of such deceased stockholders, as they deemed liable under the charter of the company to pay the same.

The actions at law, and the positions in which they stood before the court upon the pleadings, were as follows : —

First. An action of the case by the New England Commercial Bank against Seth W. Macy, administrator of Joseph Weaver, late of Newport, deceased, the declaration in which, in substance, counted upon the above facts, so far as applicable to the New England Commercial Bank, and alleged, that the defendant's intestate, Weaver, was a corporator of, and shareholder in, the Newport Steam Factory when that company's liability for a certain portion of the plaintiff's claim, not specified, was incurred, and thereby became liable for, and in consideration thereof promised to pay the same; that Weaver's estate had been represented insolvent, and commissioners had been appointed to receive and examine the claims against the same; that the claim of the plaintiffs had been presented to and rejected by said commissioners, whereby, and by force of the statute in such case made and provided, the plaintiffs were compelled to pursue their remedy at the common law, and to commence this suit against Weaver's administrator. To this declaration the defendant had pleaded the general issue.

Second. A similar action by the same plaintiffs against Samuel Allen, executor of Samuel Allen, late of Newport, deceased, with similar averments in the declaration; the declaration, however, specifying the claim sought to be enforced, as the four notes executed by the Newport Steam Factory on the 3d day of February, 1852, and for which the plaintiffs had recovered judgment against the company, for the sum of \$19,492.81 debt, and costs of suit taxed at \$6.20. To this action, also, the defendant had pleaded the general issue.

Third. A similar action by Josiah S. Munroe against Seth W. Macy, administrator of Joseph Weaver with similar averments in the declaration, to which no plea was filed.

Fourth. A similar action by the same plaintiff against

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Daniel Tisdale, James F. Simmons, George Bowen, Stephen B. Chase, John Stevens, Benjamin H. Stevens, William C. Gibbs, Edward W. Lawton, and Benjamin Finch, all being served in the action but Daniel Tisdale, who could not be found by the sheriff, the declaration alleging them all to have been stockholders of the Newport Steam Factory at the time when the liability was incurred by the company, for which the plaintiff had recovered against it his larger judgment for \$7,050.93 debts, and \$11.35 costs, with similar averments, as to the return of the execution by the sheriff unsatisfied, for want of property of the corporation upon which to levy it, the charter liability, and the promise of the defendants in consideration of it to pay the plaintiff's debt. This action was originally brought in the court of common pleas for the county of Newport; and the defendants having submitted to judgment in that court, brought the case, by appeal, to this. The defendants pleaded, —

First, in abatement, that Joseph Weaver, when in life, was a stockholder in the Newport Steam Factory, and so remained at the time of his decease, in 1857; that in 1857, Seth W. Macy was appointed and qualified to administer on his estate; "whereby, and by virtue of the premises, the defendants aver, that the said several contracts referred to in the plaintiff's declaration as having been made with the Newport Steam Factory and the liability there set forth, was incurred jointly with the said Seth W. Macy, administrator, as he, by virtue of his office, was a stockholder of the said corporation at the time the debt was contracted, and the liability incurred upon which the plaintiff obtained his judgment; wherefore, because said Macy, administrator of said Weaver, is not named in said writ and declaration together with the said defendants, they pray judgment of said writ and declaration, and that the same may abate, &c."

To this there was a general demurrer filed by the plaintiff, in which the defendants joined.

The *second* plea to this action, was, in abatement, that at the time of the commencement of the action the Newport Steam Factory had and held a large amount of property

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which was not exhausted, and which might have been levied upon by the sheriff, or taken and applied to the satisfaction of the execution referred to in the plaintiff's declaration, and which, by force of the act incorporating the Newport Steam Factory, should have been levied upon, taken, or applied to the satisfaction of the plaintiff's judgment before the commencement of this action against the defendants.

To this plea, the plaintiff replied, —

First, by traversing the allegation in the plea, that the Newport Steam Factory had, at the commencement of the action, a large amount of property upon which his execution might have been levied, and concluding to the country.

Second, by alleging his recovery of judgment against the company, the issuing of his execution, its delivery to the sheriff of the county of Newport, his inability, after diligent search and due inquiry, to find any property of the company on which to levy it, his demand upon the president and agent and treasurer of the company to show and set forth such property and their refusal to do so, and the return by the sheriff, for these reasons stated in his return, of the execution wholly unsatisfied. This replication concluded to the country.

Third. The plaintiff further demurred, generally, to this second plea, calling it, by mistake, the third plea.

The *third* plea to this action was the general issue, in which the defendants joined.

The *fifth* action submitted, was a similar action by the same plaintiff against the same defendants, with similar averments in the declaration, for the purpose of enforcing against them his claims against the Newport Steam Factory embraced in his lesser judgment against the company, for the sum of \$3,596.65, debt, and costs of suit taxed at \$6.60.

In this action the pleadings were the same as in the next preceding, except that no demurrer was filed to the second plea in abatement.

As in the *sixth* and *seventh* actions at law, which appear to have been brought by the New England Commercial Bank against George Bowen and others, as stockholders of the New-

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port Steam Factory, the declarations were missing, it is unnecessary to detail the pleadings.

There were two bills in equity; both filed by the New England Commercial Bank, to enforce their claims against the company upon the stockholders, and the estates of stockholders, of the corporation. The *first*, which was filed by the bank on its own behalf, and on that of all other unsatisfied creditors of the Newport Steam Factory, who being thereunto lawfully enabled should come in and contribute to the expenses of the suit, was filed against Mary L. Ruggles, in her own proper person, and as administratrix of the estates of Nathaniel S. Ruggles, and of John P. Ruggles, late of Newport, deceased; Seth W. Macy, administrator of the estate of Joseph Weaver, late of Newport, deceased; Pernissa Gyles, executrix of the last will and testament of Charles Gyles, late of Newport, deceased; Samuel Allen, executor of the last will and testament of Samuel Allen, late of Middletown, deceased; John Stevens, Benjamin H. Stevens, George Bowen, Stephen B. Chase, William C. Gibbs, and Edward W. Lawton, all of Newport, Daniel Tisdale of Keokuk in the state of Iowa, James F. Simmons, of Johnston, in the state of Rhode Island, and the Newport Steam Factory; and alleged, that the Newport Steam Factory was, in the lifetime of said Joseph Weaver, Samuel Allen, and John P. Ruggles, deceased, and at the time of their decease, and whilst the said Mary L. Ruggles, as administratrix of the said Nathaniel S. Ruggles, was possessed of, or entitled to, his certain shares in the capital stock of said company, largely indebted to the complainants; that said indebtedment arose out of certain loans and discounts made by the complainants to and for the Newport Steam Factory, and for which the complainants held four promissory notes of the company, all dated on the 3d day of February, 1852, and payable sixty days after date; one, for the sum of \$6,800; one, for the sum of \$7,000; one, for the sum of \$4,000, and one, for the sum of \$800, in all amounting to the sum of \$18,600, upon which interest had been paid up to the 1st day of July, 1857; that said moneys were loaned and discounted by the complainants to said company in reliance upon

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the liability of the said defendants now living, and of the said Weaver, John P. Ruggles, and Allen, now dead, for the payment thereof; and that the living defendants and said Weaver, Ruggles, and Allen, were stockholders of said corporation at the times the debts aforesaid were contracted; that the said Newport Steam Factory was also, in the lifetime of said Weaver, Ruggles, and Allen, and whilst said Mary L. Ruggles, as administratrix, was possessed of and entitled to his said shares, and still is, indebted to several other persons. The bill then goes on to state the obtaining by the plaintiffs of judgment against the Newport Steam Factory for the sum of \$19,493.81 debt, and \$6.20 costs of suit; the issue of execution thereon, and the return of the execution by the sheriff wholly unsatisfied for want of property to be by him found, whereon to levy the same; that, at the time of contracting of the debt for which said judgment was obtained, the said Mary L. Ruggles, as administratrix of said Nathaniel S. Ruggles, and the said John P. Ruggles, and the said Pernissa Gyles, Samuel Allen, deceased, Joseph Weaver, deceased, and the living defendants named, were the stockholders of said corporation; that said Nathaniel S. Ruggles was, in his lifetime, possessed of one share of the stock of said corporation and of considerable other property, real and personal; that he departed this life in February, 1847, leaving the said Mary L. his widow, and John P. Ruggles his only child and heir at law; and that, on the 5th day of April, 1847, the said Mary L. was appointed administratrix on his estate, and thereupon possessed herself of the personal estate and effects of her intestate to a considerable amount; that by force of the act incorporating the Newport Steam Factory, a copy of which is annexed to the bill, it is amongst other things provided, that the shares of the capital stock of said corporation shall be deemed to be the personal estate of the respective stockholders, and that by force of said act the said Mary L. Ruggles, as administratrix of said Nathaniel S., became and was possessed of and entitled to his said share, to be administered with his other personal estate, and as such administratrix continued to be possessed of and entitled to said share, as well as in her own right, until the 11th day of December, 1852; that

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said Mary L. soon after the death of said Nathaniel S. entered upon and took possession of one third part of his real estate as tenant in dower, and hath continued in possession thereof ever since that time until the 11th day of December, 1852, receiving the rents and profits thereof, and paid sundry assessments thereon, and otherwise acted as a stockholder in said company, and contracted with said company to indemnify her against her liability for the debts of the same; that said John P. Ruggles, upon and soon after the death of said Nathaniel S. entered upon and took possession of the residue of his real estate, and afterwards, and at sundry times and by divers assurances, the same being deeds of gift, conveyed to said Mary L. divers parcels of said residue of said real estate, and said Mary L. hath been ever since in the possession of the same, receiving the rents and profits thereof; that said John P. Ruggles continued in the possession of the whole or greater part of the said lands which came to him as heir of his said father, and in the receipt of the rents and profits thereof, and was during his lifetime and at his death seized and possessed of considerable other property, real and personal; that said John P. died in March, 1852, intestate and unmarried, leaving his mother, the said Mary L. his heir at law, surviving, and that said Mary L. was, on the 14th day of June, 1852, appointed administratrix on his estate, and hath possessed herself of his personal estate to a considerable amount; that said Mary L. soon after the death of said John P. as his heir at law, entered upon and took possession of all his real estate, and hath ever since continued, and now is in possession of the same, receiving the rents and profits thereof; that said Joseph Weaver was in his lifetime, and at the time of his death, seized and possessed of considerable real and personal estate; that he departed this life on the first day of April, 1856, and that Seth W. Macy was, on the second day of June, 1856, appointed administrator on his estate, and hath possessed himself of his personal estate to a considerable amount, and hath entered upon his real estate and possessed himself thereof, and ever since hath been and now is in possession of the same, taking the rents and profits thereof; that said Charles Gyles was in his lifetime and at the time

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of his death seized and possessed of considerable real and personal estate, and by his last will and testament devised the same to his wife Pernissa Gyles, and appointed her his sole executrix; that said Charles died on the 10th day of May, 1849, leaving the said Pernissa him surviving, who proved his said will, and took upon herself the execution thereof, and possessed herself of all or most of the personal estate of her said testator, and as devisee and legatee of said Charles, has entered upon and enjoyed the rents and profits of the real estate and other property of the said Charles, and continued to hold and enjoy the stock or shares of the said Newport Steam Factory, until the 15th day of December, 1852, when she sold the same to the said corporation and required an indemnity from the said company to protect her from her liability for the debts of said company; that said Samuel Allen was, in his lifetime and at his decease, seized and possessed of considerable real and personal property, and by his last will and testament, bearing date the 5th day of September, 1853, appointed the defendant, Samuel Allen, the sole executor of his will; that he departed this life the 6th day of September, 1855, leaving the said Samuel Allen, defendant, him surviving, who duly proved said will, and took upon himself the execution thereof, and by virtue of the same possessed himself of all or most of the personal estate of his said testator, and of his real estate so far as requisite for the payment of the debts of said Samuel; that said Allen, in his lifetime, to wit, on the 11th day of January, 1853, sold his stock in said company to Benjamin Finch, and received from said Finch a bond, with surety, in the sum of \$40,000, to indemnify his estate against the debts of said corporation, and paid said Finch for said indemnity the sum of \$2,500, in addition to transferring to him his said stock; that on the 15th day of February, 1858, the Newport Steam Factory assigned to Seth W. Macy, their factory estate, and wharf, together with all their machinery, tools, &c. in trust for the benefit of their creditors; that the whole of the judgment debt of the plaintiffs remains due, and that the said Newport Steam Factory hath not any property whatever, upon which execution can be levied for the satisfaction of the same

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or any part thereof, and that there are no means for paying the same in the hands of said trustee or otherwise. The bill then proceeds to set forth the amendment to the charter procured by the stockholders at the January session of the General Assembly, 1840, and to state, that the plaintiffs have frequently requested Mary L. Ruggles, as administratrix of Nathaniel S. and John P. Ruggles, and in her own behalf, the said Seth W. Macy, administrator of said Joseph Weaver, and the said Thomas J. Weaver, and the said Martha Potter and her husband, and the said Pernissa Gyles, executrix and sole devisee of the said Charles Gyles, and the said Samuel Allen, executor of said Samuel Allen, to account with them, and the other unsatisfied creditors of said corporation, for the personal estate of their respective decedents, and to apply the same to the payment of their respective demands, which they have refused to do, as well as their decedents in their lifetime, to whom similar application was made; that said personal estate of said Nathaniel S. and John P. Ruggles, of said Weaver, Gyles, and Allen was more than sufficient to pay all their respective funeral and testamentary expenses, and the expenses of supporting their respective families and of settling their respective estates, of paying their respective separate debts, as well as the said debt of the plaintiffs, and the other unsatisfied debts of said corporation, and that it would so appear, if said Mary L., Seth W., Pernissa and Samuel would respectively set forth an account thereof, which they have respectively refused to do; and the plaintiffs insist, that in case such personal estate shall not prove, upon such an account, to be sufficient to answer said debts, that the deficiency ought to be made good out of the real estate of the said Nathaniel S. Ruggles, John P. Ruggles, Joseph Weaver, Charles Gyles, and Samuel Allen, respectively; and that the same, or a sufficient part thereof, ought to be sold or mortgaged for that purpose, but that the said Mary L. Ruggles, Pernissa Gyles, Seth W. Macy, the said Thomas J. Weaver, and the said Martha Potter, and the said Samuel Allen refuse to account for the rents and profits of the real estate by them received, or to apply the same towards the payment of said debts. The bill then prays that an account may be taken

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of the respective personal estates of said Nathaniel S. Ruggles, John P. Ruggles, Joseph Weaver, Charles Gyles, and Samuel Allen, and of what part of the same has been disposed of in the payment of funeral expenses, &c. of the separate debts of the said deceased, and what separate debts of the deceased remain unpaid; and that the balance of the respective personal estates of said decedents, after payment of said expenses and separate debts, may be ratably applied to the payment of the debt of the plaintiffs and of the debts of the other unsatisfied creditors of said corporation; and in case of such balance proving insufficient for that purpose, that an account may be taken of the rents and profits of the real estates of said Nathaniel S. Ruggles, Joseph Weaver, Charles Gyles, and Samuel Allen respectively received by them the said ———, and that what may appear to have been received by them or either of them, or a sufficient part thereof, may be applied in or towards making good the said deficiency; and in case the said several funds should prove insufficient for the payment of said debts, that a sufficient sum of money may be raised by sale or mortgage of such real estates respectively; and that all proper parties may be decreed to join in such sale or mortgage, and that the money to arise from such sale or mortgage may be paid to the plaintiffs and to the other unsatisfied creditors of the said corporation, and for general relief.

To this bill, the defendants, Macy, Gyles, Allen, John Stevens, Bowen, Lawton, Gibbs, and Simmons put in their several answers, the other defendants having filed no answers.

The answer of Macy alleged, that on the 19th day of August, 1847, his intestate, Joseph Weaver, became the owner, by purchase from one George Hall, of one share in the capital stock of the Newport Steam Factory; that at that time, the stockholders of the company consisted of John Stevens, William C. Gibbs, and George Bowen, each of whom owned two shares, and John and Benjamin Stevens, Samuel Allen, Charles Gyles, the representatives of Nathaniel S. Ruggles, George Bowen and Stephen B. Chase, Edward W. Lawton, Daniel Tisdale, and James F. Simmons, who owned one share each, except the said Stevenses, who held, as well as the said Bowen and

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Chase, a share between them, making in all fifteen shares, which comprised the whole capital stock of said company; that upon the death of his intestate and his appointment as administrator, he represented the estate of his intestate to be insolvent, whereupon commissioners were appointed to receive and examine the claims against the estate; that said commission was, and for some time before the 8th day of September, 1858, when this bill was filed, had been open for the reception of claims against the estate of his intestate; but that the plaintiffs had presented no claim to said commissioners, and the respondent contended that he was not bound to answer the bill. He, nevertheless, proceeded to set up in defence, that \$1,500, part of the plaintiffs' claim, grew out of a loan made by the plaintiffs to the Newport Steam Factory, on the 31st day of March, 1847, and \$4,000, another part of it, out of a loan made by the plaintiffs to the corporation, on the 24th day of June, 1847, before his intestate became a stockholder in said company, for which said portions of the debt of the plaintiffs, his intestate was not liable; that at the times when these portions of said debt accrued, George Hall, Edward King, and J. T. & P. H. Rhodes were respectively stockholders of said corporation, and that said Hall, King, and James T. Rhodes, the surviving partner of J. T. & P. H. Rhodes, are still in full life; that Hall then owned two shares of said stock, King one share, and J. T. & P. H. Rhodes, one share, and should have been made parties defendant to the bill; that of the residue of the debt of the plaintiffs, \$7,000, accrued on the 9th day of October, 1847, and \$6,800, on the 20th day of January, 1848, when said amounts were loaned by the plaintiffs to the company, when his intestate was the owner of one share in the stock of the company, but that he was ignorant, whether his intestate's estate in his hands was liable for said sums or any portion of the same, and submitted the same to the court; that after the payment of the debts of his intestate and the expenses of settling his estate, the balance would be quite insufficient to pay the plaintiffs' debt. He denied that he had ever entered upon or possessed himself of the real estate of his intestate, but admitted that the Newport Steam Factory had executed to him an assignment in trust

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of their property for the benefit of their creditors; that he had already realized some \$16,000, gross proceeds of the assigned property sold by him, and that he still held a part of the real estate assigned of which he expected to make sale at the first favorable opportunity.

The answer of *Pernissa Gyles* admitted that her testator, Charles Gyles, was, during his lifetime, and at his death on the 10th day of May, 1849, the holder of one share in the capital stock of the Newport Steam Factory; that he made and published his last will and testament in the manner and form and to the effect set forth in said bill of complaint; that said will was admitted to probate, that she procured letters testamentary as executrix thereof, and that by the provisions of said will she was made sole devisee of all the estate, real and personal, of said Charles Gyles, after payment of his just debts and funeral and other expenses; that upon obtaining her letters testamentary, she, on the 21st day of July, 1849, caused public notice of her appointment and qualification as executrix of said Charles Gyles to be published in the "Newport Mercury," a newspaper printed and published in Newport, in conformity with the statute in such case made and provided; and thereafter went into possession of the estate, real and personal, of said Charles Gyles, taking the rents and profits thereof, and therefrom proceeded to pay the debts and funeral expenses of said Charles, and other expenses incidental to the settlement of his estate; that afterwards, on the 21st day of April, 1851, the final account of this defendant, as executrix of the last will and testament of said Charles, was duly presented to, examined, settled, and ordered to be recorded by the court of probate of Newport; that by the provisions of said will she became entitled to, and possessed herself of, all the remaining estate and effects, both real and personal, of which the said Charles Gyles died seized and possessed, subject only to such unsatisfied debts and demands due from said Charles as might be produced and demanded from her as executrix within three years from the date of said publication of notice of her appointment as aforesaid; and that more than three years had elapsed subsequent to the publication of said notice before the filing of this bill on the

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8th day of September, 1858, and that by force of the statute, and in equity and good conscience, said bill of complaint ought not further to be maintained against her either in her capacity of executrix, devisee, or in her own right.

The answer of *Samuel Allen*, after admitting the will of his testator, his death on the 6th day of September, 1855, the probate of the will on the 15th day of October, 1855, the issue of letters testamentary to him as executor of said will and public notice thereof given by him, also admits, that his testator, Samuel Allen, was formerly a stockholder of the Newport Steam Factory, being the holder of one share in the capital stock thereof, but avers, that on the 10th day of January, 1853, his testator sold and conveyed said share to Benjamin Finch, which sale was recognized by said corporation by the transfer of the same according to the forms of the charter; that due notice of said sale and transfer was by his testator published for three weeks in the "Newport Mercury," and that he was no longer responsible for the debts of said company, and that no action was commenced by any creditor of said corporation against this defendant or his testator until the filing of this bill. The answer then avers that \$1,500 of the claim of the plaintiffs against the corporation was incurred on the 31st day of March, 1847, and \$4,000, also part of said claim, was incurred on the 24th day of June, 1847; that at those times, George Hall, Edward King, and J. T. & J. P. Rhodes, were stockholders of said corporation, and as such liable for its debts, and should have been joined as defendants to the bill; and that if his testator's estate is liable for any portion of the debts of said corporation it is liable only to the amount of the par value of the share held by him at the time when said debts were contracted, to wit: to the amount of \$3,000.

The answer of *Edward W. Lawton* admits that he is, and has for a long time been, a stockholder in the Newport Steam Factory, as alleged in the bill, but avers that \$800, part of the plaintiffs' demand, was incurred on the 31st day of March, 1847, and \$4,000, another part of the same, was incurred on the 24th day of June, 1847, when George Hall, J. T. & J. P. Rhodes, and Edward King, were stockholders of the corporation, and when

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Charles Gyles, Joseph Weaver, and James F. Simmons, were not stockholders, and claims that, so far as this portion of the plaintiffs' claim is concerned, the bill is defective in not joining Hall, James T. Rhodes, as surviving partner of the firm of J. T. & J. P. Rhodes, and King as defendants, and also defective for misjoining the representatives of Gyles and Weaver, and James F. Simmons as defendants; that as to \$7,000, part of the balance of the plaintiffs' claim, the same was incurred on the 9th day of October, 1847, and that the remaining part of said claim, exclusive of interest, was incurred on the 28th day of January, 1848, when Samuel Allen, J. & B. H. Stevens, Charles Gyles, George Bowen & Co., a firm consisting of George Bowen and Stephen B. Chase, Nathaniel S. Ruggles, John Stevens, George Bowen, William C. Gibbs, Edward W. Lawton, James F. Simmons, Joseph Weaver, and Daniel Tisdale, were sole stockholders of said corporation; and that the bill is defective in misjoining causes of action as well as parties; that if the defendant is at all liable for the debts of the corporation he is not liable for a greater sum than the par value of the share of stock held by him in the capital stock of said corporation, to wit: for the sum of \$3,000; and at all events is not liable as a joint contractor for all said debts, but only for such proportion of them as his proportion of the capital stock, to wit: one share out of fifteen shares, bears to the whole capital stock of the corporation; that the Newport Steam Factory is indebted, in a large sum of money, to the defendant for advances, and that the amount of his said advances should be deducted from the proportion of the liabilities which he should be decreed to pay.

The joint and several answer of *John Stevens* and *George Bowen*, admits that they were, and for a long time have been, stockholders in the Newport Steam Factory as alleged in the bill, and that said corporation is indebted to the plaintiffs as is in said bill alleged. In other respects, this answer sets up the same defences, of nonjoinder of parties and misjoinder both of parties and causes of action, as the answer next preceding; and claiming the same restrictions of liability, also sets up large advances made by the respondents to the corporation, and

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insists, that the amount thereof should be deducted from such proportion of the debts as they should be decreed to pay.

The answer of *William C. Gibbs*, admits that he was a stockholder in the Newport Steam Factory, and the indebtedment of the corporation to the plaintiffs as alleged in the bill, and sets up the same nonjoinder of parties, and misjoinder of parties and causes of action, as the answer of *Edward W. Lawton*; and claims the same limitation of liability for the debts of the corporation, but makes no claim for deduction for advances.

The answer of *James F. Simmons* admits, upon information and belief, the stockholdership of *Nathaniel S. Ruggles*, *Joseph Weaver*, *Charles Gyles*, and *Samuel Allen*, in the Newport Steam Factory, as stated in the bill; their deaths, and the other facts stated in the bill as to the disposition of their estates and possession of the same by *Mary L. Ruggles*, *Seth W. Macy*, *Pernissa Gyles*, and *Samuel Allen*, their respective personal representatives. Professing the respondent's ignorance of the amount of the debt due from the Newport Steam Factory to the plaintiffs, it avers, upon information and belief, the same nonjoinder of *Hall*, *James T. Rhodes*, and *Edward King*, as parties defendant, as to \$4,800, part of the plaintiffs' claim, as the answer of *Edward W. Lawton*, and the misjoinder of the respondent and of the representative of *Weaver*; that when the remainder of the debt of the plaintiffs was contracted, the said *Samuel Allen*, now deceased, until on or about the 10th day of January, 1858, and from and after that time *Benjamin Finch*, in his stead, by purchase thereof, owned one share; that the said *Charles Gyles*, until his decease, on or about the 10th day of April, 1849, and after his decease, the said *Pernissa Gyles*, as his personal representative or executrix and sole devisee, owned one share of the stock of said corporation with *Joseph Weaver*, until his decease on or about the 1st day of April, 1856, when he was succeeded in his interest in said share by *Seth W. Macy*, his personal representative, but in what proportions the respondent is wholly ignorant; that with these, said *John* and *B. H. Stevens*, said firm of *George Bowen & Co.* the said *Mary L. Ruggles*, either

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as administratrix of said Nathaniel S. or in her own right, said John Stevens, George Bowen, William C. Gibbs, Edward W. Lawton, Joseph Weaver, since deceased, and this defendant, were the sole stockholders of said corporation; that, though after the decease of said Nathaniel S. Ruggles and Charles Gyles, their personal representatives, the said Mary L. and Pernissa, attempted to make sale of their respective shares of stock to said corporation, the attempted sale was invalid, illegal, and void, because, 1st: the said corporation had no power to purchase its own stock; 2d: because the meeting of said corporation, at which said pretended sale and purchase were attempted to be made, was not legally and properly notified and called, inasmuch as no legal notice of the call thereof was given to all the members and stockholders of said corporation; and 3d: because a sufficient number and quorum of said stockholders was not present at said meeting to transact such business as the purchase of its own stock; and the answer sets up the misjoinder thereby caused of the causes of action embraced in the bill. The answer admits the judgment of the plaintiffs, the issue of execution thereon, and the return thereof by the sheriff, and the charter of the Newport Steam Factory and amendment thereof as alleged in the bill, and claims that the number of shares of the capital stock of the corporation was fifteen, of the par value of \$3,000 each; and setting out the shareholders of the corporation at the times when the respective portions of the plaintiffs' debt was incurred, and the number of shares held by each, insists, that the stockholders who were such when the respective portions of the plaintiffs' debt was incurred, are not jointly liable therefor, but severally liable for the same, and only in the proportion which the share or shares of each stockholder bears to the whole capital stock of the corporation, and not to exceed the value of the share or shares held by each; that the respondent is not liable for the said portions of the plaintiffs' debt incurred on or about the 31st day of March, 1847, and the 24th day of June, 1847, before he became a stockholder of said corporation, but only for the balance thereof, and in the proportion and with the restriction aforesaid; that he has advanced to said corporation the sum of \$750, and his note for \$250, now

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outstanding, and he claims to deduct the same, with interest on the said sum of \$750, from any liability which he may be under for the debts of said corporation; that he has been informed and believes that the Newport Steam Factory on the — day of —, 1858, conveyed to Seth W. Macy, real and personal estate of the value of \$16,000, in trust, to be by him reduced to money and appropriated to the payment of the corporate debts; that the assignees of Philip Allen & Sons have declared a dividend out of the estate in their hands, and are ready to pay a dividend on the claims held by the complainants and set forth in the schedule thereof annexed to said bill, as the drafts of G. Bowen, agent, accepted by Philip Allen & Sons, and that said assignees, as the respondent has been informed and believes, will in April, 1859, declare and be ready to pay a further dividend upon said claims of the plaintiffs of from seven to ten per cent.; that the residue of said claims set forth in said schedule arises out of discounts made by the plaintiffs for said corporation of the drafts of G. Bowen, agent, on Aaron L. Lippincott, a part of which the respondent is informed and believes to be collectable; and the respondent insists, that the plaintiffs ought first, and before having any decree against him in this cause, to collect whatever is collectable from the acceptors of said last-mentioned drafts, and from the said assignees of Philip Allen & Sons, and from the said Seth W. Macy, assignee of said corporation.

To these answers the plaintiffs filed the general replication.

The other bill in equity was filed by the New England Commercial Bank of Newport, for themselves, and in behalf of all other unsatisfied creditors for the time being of the Newport Steam Factory, against Seth W. Macy, administrator of Joseph Weaver, Benjamin Finch, John Stevens, Benjamin H. Stevens, George Bowen, Stephen B. Chase, William C. Gibbs, Edward W. Lawton, Daniel Tisdale, James F. Simmons, and the Newport Steam Factory, averring, that the said defendants, and the said Weaver in his lifetime, were stockholders in the Newport Steam Factory, and were all holders of one share, each, in the stock of said company, except Gibbs, Bowen, and Stevens, who were the holders of two shares of said stock, each; the share

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belonging to Stephen B. Chase standing in the name of George Bowen & Co. The bill then sets forth the charter and amendment to the charter of the company, by reference to them, as annexed, and states that in the years 1857 and 1858, the company became indebted to the plaintiffs for certain sums of money loaned to, and discounted for the company, specifying the sums by reference to a schedule annexed; and that the company having failed to pay the same, the plaintiffs, on the 15th day of April, 1858, recovered against the company therefor a judgment of the supreme court for the county of Newport, in the sum of \$17,870.14 debt, and costs of suit taxed at \$740, for which, on the 29th day of July, 1858, execution issued, and was delivered to the sheriff of the county of Newport, who, after diligent search and inquiry for property of the company upon which to levy the same, and after being informed by the president and treasurer of the company that there was no such property, on the 30th day of July, 1858, returned said execution, for want of such property to be by him found, wholly unsatisfied; that, on the 15th day of February, 1858, said corporation assigned all its real estate for the equal benefit of all its creditors; that the judgment of the plaintiffs has not been satisfied in any part, and that the corporation is wholly insolvent. The bill then proceeds to state, that Weaver died on the 1st day of April, 1856, intestate; that on the 2d day of June, 1856, Macy was appointed administrator of his estate; that the plaintiffs have frequently demanded payment of their debt from said corporation, from said stockholders, from Weaver, in his lifetime, and from Macy, his administrator, since his death, who have neglected and refused to pay the same or any part thereof; and prays, that Macy may be directed to pay from the proceeds of the estate of Weaver, if sufficient, the amount of their said judgment, with interest and costs, and that the other defendants be directed to pay any deficiency in the payment by Macy, and for further relief.

To this bill Seth W. Macy filed his answer, alleging therein that he had represented the estate of his intestate to be insolvent, the appointment and qualification of commissioners to receive and examine claims against the same, and their ap-

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pointment of times for such receipt and examinations as in his answer to the other bill; the pendency of said commission at the time of filing the bill; and that the plaintiffs had presented no claim against said estate to said commissioners, so that he could object to the same, and that he had not consented to have the same settled by a court of law; that Nathaniel S. Ruggles and Charles Gyles were in their lifetime shareholders in the stock of said Newport Steam Factory, and that, upon their decease, their said shares became and were the property of their respective personal representatives, Mary L. Ruggles, administratrix of said Nathaniel S. and Pernissa Gyles, executrix of said Charles; that said corporation, without the consent of this defendant's intestate, undertook to purchase from said Mary L. as such administratrix, and of the said Pernissa, as such executrix, the respective shares of their decedents, but that said pretended purchase was not made at any duly notified meeting of the stockholders of said corporation, or at any meeting at which the defendant's intestate was present; that without the share of said Mary L. Ruggles being represented in said meeting there was no quorum of the members of said corporation present, competent to transact any such business, and that inasmuch as the said Mary L. could not vote upon the question of such purchase from herself, her share could not be considered as making up any part of a quorum for the transaction of such sale and purchase; that, in addition, said corporation had no power or authority to purchase any part of the capital stock of said corporation; and that inasmuch as said Pernissa Gyles as executrix and sole legatee of said Charles, and said Mary L. Ruggles, as administratrix and widow who received in her own right large personal estates from said Nathaniel S. are liable to contribute equally with this respondent from the estate of his intestate, they ought to have been made parties defendant with him to said bill; that having no personal knowledge of the fact, the respondent has been informed and believes that the corporation did execute to the complainants the negotiable paper, and the complainants did obtain judgment for the amount thereof, as set forth in the bill, and that he admits that his intestate owned one share, or

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fifteenth part of the capital stock of said corporation ; but that the estate of his intestate is only liable to such proportion of the corporate debts as said one share bears to the whole capital stock of the corporation ; and that for such proportion of said indebtedment, the estate of his intestate is only liable after deducting the other debts due from his intestate and the expenses incidental to the settlement of his estate.

The answer of *Benjamin Finch* alleges the same facts to impeach the validity of the sales by Mary L. Ruggles and Pernissa Gyles of their respective shares in the stock of the corporation to the corporation, and insists, that they should have been made parties defendant to the bill, and that the complainants should be decreed to make them parties, or that all the defendants should be decreed to be liable only for thirteen fifteenths of the complainants' said debt ; that the Newport Steam Factory was indebted to the complainants, and that the complainants did obtain judgment against said Newport Steam Factory as set forth in said bill, that execution was issued thereon and return thereof made, as in said bill alleged ; but that the said persons named as defendants, who are or were stockholders of said corporation, are not jointly liable for the debts of said corporation, but are severally liable only for such proportion of said debts as the share or shares by them respectively held bear to the whole capital stock of said corporation, after deducting from such proportion the amount in which the corporation shall be indebted to the stockholders, and adding thereto the amount in which they may be indebted to said corporation ; that said corporation has assigned to Seth W. Macy, in trust, to be sold and appropriated to the payment of the corporate debts, real and personal property of the value of \$16,000 ; that the assignees of Philip Allen & Sons are ready to pay a dividend on the debts due by said Philip Allen & Sons to said corporation, and that some part of the amount due by draft from Aaron Lippincott to said corporation is collectable ; and that the complainants ought first to resort to these sources of payment, before asking a decree against this respondent.

The answer of *James F. Simmons* to this bill was in the same words as his answer to the bill against Samuel Allen and others.

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The other defendants filed no answers, and no replication appeared to have been put in.

Accompanying the bills, was a paper headed "Statement of facts in the matters of the bills in equity of the New England Commercial Bank against Seth W. Macy, administrator, Benjamin Finch et al.," but which was without signature. In this it was stated, that on the 1st day of January, 1847, William C. Gibbs, John and Benjamin H. Stevens, George Hall, and Edward King held two shares each, in the capital stock of the Newport Steam Factory, and that George Bowen, Samuel Allen, George Bowen & Co., J. & P. Rhodes, Nathaniel S. Ruggles, Daniel Tisdale, and Edward W. Lawton held one share each, in said capital stock; that the whole of said capital stock was divided into fifteen shares of the par value of \$3,000 each, all of which had been paid in; that in addition to this, on the 23d day of April, 1850, an assessment of \$1,000 on each share was made, all of which was paid in, with the exception of a balance of \$250, and that a further assessment of \$500 per share was laid in 1852, which was paid upon the shares of said stock standing in the names of Samuel Allen, Joseph Weaver, George Bowen & Co., George Bowen, and Edward W. Lawton; that the indebtedment of said corporation to the New England Commercial Bank, accruing before the — day of — 185—, accrued in the manner and at the times set forth in the answer of George Bowen; that when said indebtedment accrued, George Bowen, the treasurer of the Newport Steam Factory, was the president of said bank, and that Josiah S. Munroe and Samuel Allen, directors in said bank, knew of the transfers of the shares in the Newport Steam Factory at the times said transfers were made; that all of the meetings of said Newport Steam Factory were called by notifying, personally, the stockholders, of the time and place of meeting; if any of the stockholders who resided in town were out of health, or were residing out of town, when it was supposed to be impracticable for them to attend the meetings of the stockholders, they were not notified; that Joseph Weaver, being in ill health, and Daniel Tisdale, being out of town, were not notified of the special meeting at which the sales of the shares of Ruggles and Gyles

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to the corporation were made, nor were they present at that meeting; that the corporation is largely indebted to Benjamin Finch, George Bowen, and Edward W. Lawton, and that John Stevens has conveyed the property in trust for the payment of the debts due from said corporation, as is set forth in his answer; and Seth W. Macy has property in his hands, which he holds in trust to pay the debts of said corporation, as is set forth in his answer; that on the 19th day of August, 1847, George Hall sold one share of his stock in said corporation to Charles Gyles, and, on the same day, sold his remaining share to Joseph Weaver; that Samuel Allen, on the 10th day of January, 1853, sold his share in said capital stock to Benjamin Finch; that, on the 31st day of July, 1847, Edward King sold one of his shares in said capital stock to George Bowen, and, on the same day, sold his other share to John Stevens; that on the 6th day of August, 1847, James T. and Peleg Rhodes, conveyed their share in said capital stock to James F. Simmons; that Nathaniel S. Ruggles died on the — day of — 1846, and Mary L. Ruggles, his widow, was duly appointed to administer his estate, and on the — day of — 184— was qualified according to law to act in said capacity, and then gave notice of her said appointment; that Charles Gyles died on the — day of — 184—, leaving a last will and testament, a copy of which is hereunto annexed, which was duly admitted to probate, and letters testamentary were issued thereon to Pernissa Gyles on the — day of — 18—, who then gave notice of her said appointment; that Joseph Weaver died at the time, and such proceedings were had in settling his estate, as is set forth in the answer of Seth W. Macy; that Mary L. Ruggles and Pernissa Gyles made sale of the respective shares of their intestate and testator in said capital stock, if the following facts constitute a sale. Mary L. Ruggles was appointed and qualified as the administratrix of Nathaniel S. Ruggles, and on the 9th day of December, 1852, she, with Pernissa Gyles, the executrix of the last will and testament of Charles Gyles, proposed to sell the stock of their intestate and testator to said corporation; that William C. Gibbs, John Stevens, Samuel Allen, George Bowen,

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Edward W. Lawton, and George A. Richmond, representing Mrs. Ruggles, were present at the meeting. They knew the object of the meeting, but none of the other stockholders had notice of, or knew of the meeting, with the exception of James F. Simmons, who knew of it, but was not present. Neither Mrs. Ruggles, nor Mrs. Gyles had any authority from the court of probate to make sale of the stock; and the corporation at this meeting voted to purchase it, and conveyances were made by the parties to the corporation of the stock, which may be referred to in connection herewith. Mrs. Ruggles and Mrs. Gyles each paid to the treasurer of the corporation a sum of money, at the time they conveyed their shares.

The unsigned paper containing the above statement of facts is in the handwriting of one of the counsel for the defendants. Accompanying this, and in the handwriting of one of the counsel for the complainants, was another paper, containing the following statement: —

“ The Newport steam mill had obtained discounts, from time to time, from the New England Commercial Bank; and on the third day of February, 1852, the notes held by the bank were given up by the bank, and a new loan made by the bank to the Newport Steam Factory, and new notes for said loan were given the bank, by reason, that shortly prior to that time a change had been made in the ownership of some of the stock of said Newport Steam Factory, and intending at the time of said loan to make a new contract with the new stockholders. The notes given on said third day of February 1852, are the notes upon which judgment has been obtained, and upon which this bill is filed. The acceptances upon which the judgment was obtained, and upon which the second bill in equity was brought, were given during the year 1857. The executions against the corporation have been returned *non est*.

Bradley, for the complainants.

1. The stockholders of the Newport Steam Factory are severally, or jointly and severally, liable to its creditors for the payment of the entire debts of the corporation. Such a liability is created by the terms of the charter. The amendment of January, 1840, is: “ All executions that shall issue against

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said corporation shall be levied on the property of said corporation, and for want of such property the stockholders, who were such at the time the contract was made or liability incurred, shall be liable in their own persons and estates, as if the contract had been made or liability incurred by them personally." (Sect. 2 of the amendment to Charter of Newport Steam Factory, January, 1840.) This construction is especially appropriate, as the charter does not provide for the creation of a capital stock, but leaves that to the discretion of the corporators. It is also confirmed by the provision, giving a right of action by one corporator, who has paid more than his share of the company's debts, against another, for contribution. (Sect. 9.) As to the effect of this provision, see *Crease et al. v. Babcock et al.*, 10 Metcalf, 525, 559. This construction accords with that put upon the language of the charter by the corporators in their application to the general assembly for an amendment. (See petition for amendment and original 8th section.) The effect to be given to the petition to the general assembly, as a construction by the parties, is shown in *Atwood v. R. 1. Agricultural Bank*, 1 R. 1. Rep. 376, 387. Such is the policy of our manufacturing corporations laws.

2. The decisions on similar statutes in other states confirm the construction here claimed. Under the general manufacturing incorporations act (of March 22, 1811), in New York, which provides, "That for all debts which shall be due and owing by the company at the time of its dissolution, the persons then composing such company shall be individually responsible to the extent of their stock," (3 Rev. Sts. N. Y. 311, 1829,) it was held, that each stockholder was severally liable for the whole debt, not exceeding the amount of his stock. *Bank of Poughkeepsie v. Ibbotson*, 24 Wendell, 473; *Same v. Same*, 5 Hill, 471. These cases are cited as law in Angell & Ames on Corporations, § 619, with the remark, that the usual construction is in favor of the several liability.

3. If the liability be not simply several, or joint and several, it is in the nature of a copartnership liability, as in the case of *Allen v. Sewell*, 2 Wend. 327, where the stockholders were

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by charter individually liable for all contracts. The court say this is in the nature of a copartnership liability.

4. The creditor may, in equity, collect his whole debt from the estate of the deceased corporator or partner. According to Adams's Equity, 172, "where a loan has been made to several persons jointly, it must be presumed that every debtor was to be permanently liable, until the money should be paid; and that, therefore, a debt so arising, though at law it is the joint debt of all the co-debtors, shall be treated in equity as the several debt of each." 3 Kent's Com. 64; 1 Story's Eq. Jur. § 676; 1 Story's Partnership, § 361, and cases cited, especially *Devaynes v. Noble*, 1 Merivale, 529; 2 Russ. & Mylne, 495; *Wilkinson v. Henderson*, 1 Mylne & Keen, 582; *Hamersley v. Lambert*, 2 Johns. Ch. 509. The early cases, which doubted whether a bill could be maintained unless the surviving partner were first prosecuted, proceeded upon the idea that the joint effects were in his hands, and should be first exhausted. In this case, the joint effects were in the hands of the corporation, and have been exhausted, as is sufficiently proved by the sheriff's return of the execution against them. Angell & Ames on Corporations, § 614. To apply these views to the cases under consideration: In the actions at law, by the demurrer for non-joinder of parties, the defendant raises the question of several or joint liability. If, as we contend, the construction, that each stockholder is liable as if he had personally made the contract, is the true construction of the charter, then the demurrer must be overruled, and we take judgment at law for our debt against the defendants, either severally, or against all, they being the surviving partners of the company. If the court hold the liability to be joint, or like that of copartners, then we may proceed in equity against the estates of deceased stockholders, the survivors being parties merely for the purpose of taking the account, and not strictly necessary parties, but to be dispensed with under the 23d rule of this court, and this being also a rule of general equity practice.

Sheffield & Wm. H. Potter, for the respondents, excepting James F. Simmons.

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1. The liability of the stockholders of the Newport Steam Factory to the corporation, was limited to the sum of \$3,000 on each share, which sum having been paid in, exhausted the power of the corporation to assess the stockholders for any loss or deficiency which might occur.

2. At common law there is no personal liability upon corporators for the corporate debts; and the court will not enlarge by construction such a liability imposed by statute. The charter of the Newport Steam Factory, as it originally stood, imposed upon its stockholders the liability of copartners, which amounts to a liability of each for the entire debts of the corporation. This, however, was repealed, and there was substituted for it, by the amendment of 1840, a liability upon the corporators who were such at the time the contract was made, for such contract, "in their own persons and estates, as if the contract had been made by them personally;" and that, not to be enforced against the corporators in the first instance, but only secondarily, in case of suit and execution against the corporation, and want of sufficient corporate property to pay it. The condition thus annexed to the liability of the corporators makes it entirely different from what it would have been if the contract had been made by them personally, notwithstanding the expression to that effect; and as the charter nowhere defines the extent of the liability, the court will not, by judicial legislation, do so. This liability, whatever it is, is several, and not joint, since the charter does not declare it to be joint. A joint liability is never construed to exist unless it is expressly created by charter or act of incorporation. *Bond v. Appleton*, 8 Mass. 472; *Pratt v. Bacon*, 10 Pick. 127; *Andrews v. Callender*, 13 Ib. 484; *Baker et al. v. Atlas Bank et al.* 9 Met. 182; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 473; *Same v. Same*, 5 Hill, 461; *Moss v. Oakley*, 2 Hill, 265; *Judson v. The Rossie Galena Co.* 9 Paige, 598. In *Atwood v. Rhode Island Agricultural Bank*, 1 R. I. Rep. 376, the stockholders were held liable only to the amount of the par value of their stock; and although the amount so assessed was insufficient to pay all the debts of the bank, the court decided, although it is not reported, that the solvent stockholders were not liable to pay

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the proportions of the insolvent stockholders, or to make up the deficiency. This decision must have proceeded upon the ground that the liability was several and not joint. The secondary, several liability of the stockholders in this case cannot be extended beyond the amount of the par value of the stock of each. See *Wood v. Dummer*, 3 Mason, 308. Again, the stockholders are *liable* merely, and not *indebted*. A liability is not a debt; since it may never become fixed, or the person liable be bound to pay anything under his liability. *Kelton v. Phillips*, 3 Met. 61. The liability is confined to the debts originally contracted whilst he is a stockholder, by the very terms of the amendment, and remains upon the stockholder after he has transferred his stock. The stock is indeed transferred subject to the corporate debts; but the secondary liability is not transferred with the stock to the purchaser of it. No stockholder can in any manner be liable for debts of the corporation incurred before he became a stockholder, notwithstanding a new or continued existence has been given to them. *Moss v. Oakley*, 2 Hill, 275; *Judson et al v. The Rossie Galena Co. et al.* 9 Paige, 598. This is not like the cases of *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 473, and *Slee v. Blum*, 3 Johns. Ch. R. 566, where the stockholders, who were such at the dissolution of the corporation, were by the terms of the acts made liable for the corporate debts. We claim the benefit of this in application to the several cases which are pending. If the statute of limitations has barred the claim as against Gyles and Ruggles's estates, and they are discharged, this operates, under our statute authorizing the release of one of two joint debtors, as a release *pro tanto* of the claim, (Rev. Stats. ch. 114, § 2,) the case being within the equity of the statute. See *Bank of Poughkeepsie v. Ibbotson*, 5 Hill, 461.

Currey, for James F. Simmons.

1. The liability of the corporators, if any, is not primary, but secondary, and arises only upon an ascertained deficiency of the corporate property. Sect. 2, Amendment of Charter.

2. The liability of the corporators is not *total*, but *proportional*, and co-extensive, not with the corporate indebtedness, but with the capital stock of the corporation. *Atwood v.*

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R. I. Agricultural Bank, 1 R. I. Rep. 376. This proportional, as distinguished from a total liability, is deducible from the general scope and purpose of the act of corporation, with its amendments. The corporation itself is the principal debtor; the corporators are liable, if at all, only as guarantors. The stockholders are not liable *as such* generally; but only as being such when the corporate liability was contracted; *when* contracted, means, when *originally* contracted; so that subsequent stockholders are not liable for *renewals* of debts contracted before they became stockholders. The amendment shows that credit was primarily to be given to the corporation, on the basis of the capital stock, with the guaranty of the then stockholders that the capital should be kept available for the creditors *to the extent of its par value*.

3. The charter and its amendments in fixing the *minimum* of the number and value of the shares, and in imposing this guaranty upon the stockholders, provided a sure basis for reliable credit, to the extent of the capital stock at any given time. Those giving credit to the corporation, might always hereby know the value of their security for payment.

4. The charter, by providing that no stockholder should be involuntarily liable to an assessment beyond \$3,000 on each share, thereby indicated the maximum of liability imposed upon the ownership of each share for the corporate debts.

5. Any other construction would defeat all the purposes of the act of amendment, the sole purpose of which was to qualify the primary and total liability of the corporators. The language of the amendment is, that the corporators shall be liable "*as if* the liability had been incurred by them personally;" not, "*the same as if*," or "*in the same manner as if*," or "*to the same extent as if*," leaving the manner and extent of the liability perfectly undefined, except so far as it can be collected from the general scope of the charter as it *was*, and as it is after amendment. Now, the capital stock was the basis of corporate credit, and the just and reasonable limitation of the personal liability of the stockholders is the measure of their interest in it.

6. The liability of the corporators, whatever the extent of it,

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is a several and not a joint liability. The amendment expressly repealed the joint or copartnership liability, and substituted for it *secondary* liability, the extent of which was to be determined in each case by the corporator's interest in the capital stock. Such a several, secondary, and proportional liability would be just and reasonable, whilst the liability contended for by the plaintiffs would be arbitrary, unjust, and ruinous.

The conclusions are:—

First. That the liability of this defendant, if any, for the debts of the corporation, can, in no just view of the case, exceed \$3,000, the par value of the one share of stock held by him.

Second. That if the entire indebtedness of the corporation, remaining after the full exhaustion of the corporate property, shall be less than the aggregate of the capital stock, then the amount or extent of the defendant's liability will be, in the same proportion, less than the par value of his one share of stock.

Third. That from the defendant's liability, thus ascertained, is to be deducted, in order to determine the final amount thereof, the indebtedness of the corporation to him; for, as by sect. 3, of the original charter, the principal debtor had a lien on the stock for debts due to the corporation—a provision resulting ultimately for the benefit of the creditors—so any indebtedness of the corporation to the stockholders is a fair and equitable set-off against the liability imposed upon the ownership of stock for the benefit of creditors.

Lastly. That no final decree can be rendered in either of the plaintiff's causes against this or any defendant, until after the corporate property shall have been wholly exhausted.

AMES, C. J. The main question in these cases, upon which nearly all other questions raised in them turn, relates to the nature and extent of the personal liability for the corporate debts imposed by the charter of the Newport Steam Factory upon its stockholders. This liability is claimed by the defendant stockholders to be several, not joint; to be secondary, in

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the sense of a mere guaranty that the capital stock, to the amount of some \$45,000 or \$48,000, shall be forthcoming, if needed, to the creditors of the corporation; and to be limited, as against each stockholder, to the amount of capital stock by him held, after deducting therefrom any debt which may be due to him by the corporation; and that a judgment or decree, even for this sum, cannot be rendered or entered up against him, until all the corporate property has been first exhausted.

We cannot agree to the soundness of this claim, or to the reasoning by which it is attempted to be supported.

The charter of this corporation, as it was originally granted, not only made the stockholders, who were such at the time when the contract was made or liability incurred, liable in their persons and estates therefor, in case no corporate property could be found to satisfy an execution issued to enforce the contract or liability against the corporation, but gave to the creditor the election to proceed, *in the first instance*, against such stockholders, precisely as if they had been mere copartners under the corporate name. It was only this right to proceed against the stockholders *in the first instance*, of which they complained to the general assembly, in 1840, as unusual and inconvenient, and of which, in effect, they procured the repeal. By the express terms of the act in amendment, if there should be no property upon which to levy an execution issued against the corporation, the stockholders designated in the act, were still to be "liable in their own persons and estates, as if the contract had been made, or liability incurred by them personally." Language can hardly be conceived more plainly imposing an unrestricted personal liability, both by force of the words "in their own persons and estates," and of the remaining words of the sentence, "as if the contract had been made or liability incurred by them personally." Notwithstanding the minute criticism which has been addressed to us upon the construction of this clause of the charter, we must hold the plain sense of the words "as if," in it, to be, "in the same manner and to the same extent," that is, "just as if" the corporators, instead of the corporation, had contracted the debt.

That such a liability is made conditional upon want of cor-

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porate property upon which to levy, in no way conflicts with this extent of liability when the specified occasion for its enforcement shall arise. So far from it, upon this construction, the stockholders are left precisely where their petition for the amendment request that they shall be—relieved from the “great inconvenience” of being proceeded against for the corporate debts, *in the first instance*, whilst, for the payment of such debts, the security of the public is undiminished.

The attempt to imply from the amount in which the corporation is authorized by the charter to assess its stockholders, a limit of their liability to that amount for the corporate debts, confounds the domestic relations of the corporation, which concern only its members, with the remedies of its creditors, which concern the public. The argument is all the other way; since, the less the corporate power to assess for the payment of debts, the greater the necessity of effectual remedies against the corporators, for their collection.

Besides, the *ninth* section of the charter, which was retained as a necessary part of it, notwithstanding the amendment, is utterly at war with the restricted liability contended for by the defendants. This section gives to any stockholder, whose property shall be sold for the payment of a debt of the corporation, or who shall be compelled to pay such debt, or any greater proportion thereof than is due to his stock, an action against the corporation to recover the amount so paid, and against the stockholders, to recover the amount paid by him over and above his just proportion. According to the argument of the defendants, the occasion thus provided for can never arise; since no stockholder, by their construction of the charter, can be subjected, at the suit of a creditor of the corporation, to more than his just proportion of a corporate debt.

It is true, that the common law visits no personal liability upon the members of a corporation aggregate for its contracts; but for this very reason the policy of this and other states and countries of the common law has, by express enactment, imposed such a liability, in some form, upon stockholders in incorporated trading and manufacturing companies, in order that the public may be secured against the consequences of the

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extravagant speculations, or even of the incautious enterprises of such bodies corporate. We may lament the private calamity which, in particular instances, has grown out of this policy; but, because we do so, have no right to pervert the clear sense of a positive enactment designed to carry it out; and if we had, should only turn from some the ruin which we should thereby bring upon others.

The same language of the charter which describes the extent, ascertains also, when construed in reference to its subject, the character of the liability thus imposed. "The stockholders, who were such at the time the contract was made or liability incurred, shall be liable in their persons and estates as if the contract had been made or liability incurred by them personally," is certainly language which imports a joint liability in the nature of that of copartners; and when it is recollected, that the liability spoken of is for debts contracted in a business carried on by all, for the profit of all, we cannot doubt but that this was the species of liability intended. To carry the analogy to copartnership still farther, by the concluding clause of the section, the stockholders are to be holden, not only for all debts incurred up to the time of the sale and disposition of their stock, but until public notice of such sale or disposition is given in some public newspaper printed in the place in which they transacted their business.

In the contingency, then, that a judgment creditor of the corporation can find no corporate property upon which to levy his execution, he is entitled to proceed against such stockholders as are liable for his debt, as joint contractors, or copartners. So far as living stockholders are concerned, his complete and appropriate remedy against them is at law, as against other copartners; his declaration stating, of course, the want of corporate property which entitles him to proceed against the stockholders liable to him, in that character.

On the other hand, in case of the death of one or more joint contractors or copartners, the liability at law remains only against the survivors; and so a creditor of this corporation, if he would pursue the estates of deceased stockholders, can only do so in equity, which, for the sake of the remedy, and to cor-

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rect the form of the contract so as to carry out its substance, construes it to be several as well as joint. It is true that the law expresses, in the act of incorporation, the form of the liability of the stockholders, as well as imposes it upon them; but the same law also provides, looking to the remedy, that the stockholders shall be liable in a certain contingency for a corporate debt in the same manner as if they had personally contracted it, and thus expressly subjects the form of the liability to the ordinary equitable correction.

As the law has been settled by the leading case of *Devaynes v. Noble*, 1 Mer. 529; S. C. 2 Russ. & Myl. 495, a creditor of the firm may pursue the estate of a deceased copartner, and so here, a creditor of the corporation, the estate of a deceased stockholder liable to his debt, for payment out of the same, without reference to the state of accounts between the copartners or stockholders and the firm or corporation, or to their solvency or insolvency; leaving the estate to seek repayment from the firm or corporation, or contribution from those liable to it. A mere equity, however, which is all that a creditor of the firm or corporation has against the separate estate of the deceased copartner or stockholder, cannot compete with an equal equity united to the legal right, of the separate creditors of the estate, to have their debts satisfied out of it; and hence, his right is only to the surplus of the separate estate after all its expenses and separate debts have been paid. *Gray v. Chiswell*, 9 Ves. 118; *Arnold v. Hamer*, 1 Freeman (Miss.) Ch. R. 509; 2 Leading Cases in Equity, Hare & Wallace's notes, 317-321, and cases cited.

In case of the death of two or more of the stockholders liable, there seems to be no objection, on the ground of multifariousness, to seeking an account of, and payment from, their respective separate estates, in the same bill; or rather, the conveniences of such a joinder are deemed to overbalance the inconveniences of it; *Brown v. Weatherby*, 12 Sim. 6; *Wilkinson v. Henderson*, 1 Myl. & Keene, 582; but as two or more creditors for whose claims different sets of stockholders are liable, cannot unite them all in the same bill, for the purpose of separate relief against those respectively liable to them,

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(*Judson v. The Rossie Galena Co.* 9 Paige 597, 603,) so, we apprehend that, for the same reason, the same creditor cannot enforce in the same bill, against the estates of deceased stockholders, different debts, for which all the estates pursued are not liable. Both at law and in equity, only those causes of action *ex contractu* can be joined in the same suit to which all the parties defendant were originally liable.

In pursuing the estate of a deceased stockholder for the payment of a corporate debt, it is obvious, that all the living stockholders and representatives of the estates of deceased stockholders liable to it, are interested in the account sought to be taken, and should be made parties to the bill; *Pierson v. Robinson*, 3 Swanst. 139, note; Story's Eq. Pl. §§ 166-168; whilst, on the other hand, the bill would be objectionable for the misjoinder of persons not interested in it, and as to them must be dismissed or amended. As we have no statute making the real estate of deceased persons personal assets for the payment of debts, but such estate, notwithstanding the insolvency of the deceased, descends to their heirs at law,—if the real estate of a deceased stockholder is sought to be charged, his heirs, in case of intestacy, and devisees, if there be a will, must, as well as his personal representatives, be made parties to the bill.

For the sake of brevity, we have stated in this general form the rules which govern the joinder of parties and causes of action applicable to the suits submitted to us, and which easily resolve the various questions upon those points which have been, or may be, raised. One or two questions require, however, more particular attention.

It is objected by the defendants to the bill in which the New England Commercial Bank seek to enforce their debt, earliest in date, against the estates of Weaver, Ruggles, and Gyles, that when the first portion of this debt was incurred, amounting to about forty-eight hundred dollars, George Hall, Edward King, and the firm of J. & P. Rhodes were stockholders, and should have been made parties defendant to the bill. As they are not in any form sought to be charged by the plaintiffs, and are not made parties to the bill, we shall notice only this objection of their nonjoinder as defendants, upon the facts which have been

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stated to us as agreed in the case. In the portion of this statement which is in the handwriting of the counsel for the plaintiffs, it is said, that on the third day of February, 1852, which was after these stockholders had sold their stock, and had probably given notice that they had thereby ceased to be stockholders, "the notes held by the bank were given up by the bank, and a new loan made by the bank to the Newport Steam Factory, and new notes for said loan were given to the bank, by reason, that shortly prior to that time a change had been made in the ownership of some of the stock of the Newport Steam Factory; and intending, at the time of said loan, to make a new contract with the new stockholders. The notes given on said third day of February, 1852, are the notes upon which judgment has been obtained, and upon which this bill is filed."

If this is to be taken by us as a portion of the agreed statement of facts, it certainly disposes of the objection we are considering. The giving up by the plaintiffs of the old notes and the taking of the new, after the retiring of these stockholders, and for the express purpose of their discharge, upon every principle, and by all the authorities, operates as a complete release of the stockholders from the debt. Collyer on Partnership, §§ 539-562, and cases cited.

The defence set up by the answer of Pernissa Gyles, executrix of Charles Gyles, late of Newport, to the account sought from her, in that capacity, of the personal estate of her husband and testator, seems to us to be a good one. The facts alleged by her, and which are substantially admitted in the agreed statement, are, that on the 10th day of May, 1849, her said husband, then the holder of one share in the capital stock of the Newport Steam Factory, died, leaving a last will and testament by which she was constituted his executrix, and sole devisee and legatee; that his said will was duly proved, and letters testamentary were issued to her, and that subsequently, on the 21st day of July, 1849, she caused public notice of her appointment and qualification as his executrix to be published in the "Newport Mercury," a newspaper printed and published in said Newport; that, thereafter, she went into pos-

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session under said will of all the estate, real and personal, of her said testator, and out of the same paid all his debts, funeral expenses, and expenses of settling his estate, and, on the 21st day of April, 1851, settled with the court of probate of Newport her final account as such executrix; and that more than three years had elapsed, subsequent to the publication, as aforesaid, of notice of her appointment and qualification as his executrix, before the filing of this bill. In the absence of fraud, which is not pretended in this case, the bar of the statute limiting suits against the personal representatives of deceased persons to three years after publication of notice of their appointment, is positive and without exception; and rests upon the policy of thus enabling the speedy settlement of the estates of the dead. Rev. Stats. ch. 161, § 8; ch. 177, § 9; *Pratt et al. v. Northam et al.* 5 Mason, 95. It is equally applicable to suits in equity as to actions at law; and has been applied by this court as a bar to a bill brought against the administrator of a deceased shareholder in an insolvent bank, to compel payment out of the estate of the intestate of his proportion of the corporate debts. *Atwood et al. v. Rhode Island Agricultural Bank et al.* 2 R. I. Rep. 191. This, of course, leaves the question of Mrs. Gyles's liability, as herself a stockholder, by virtue of her husband's bequest to her of his share of the stock of the Newport Steam Factory, and her acceptance of the bequest, wholly unaffected.

How far the above defence availed of by Mrs. Gyles, in her administrative character, is available to Mrs. Mary L. Ruggles, as administratrix of her husband, Nathaniel S. Ruggles, and how far the general statute of limitations will avail both Mrs. Ruggles and Mrs. Gyles, as successors to the real assets belonging to their respective husbands, we shall reserve; since Mrs. Ruggles has not come in and answered the bill, and no argument has been submitted to us upon these points. Both bills will probably be found to require amendment as to parties, and in other respects; and if it shall prove necessary for the plaintiffs, in order to obtain satisfaction of their debts, to pursue the estates of deceased stockholders, full opportunity will thus be afforded for these and other questions to be raised and argued.

For the same reason we reserve the questions which have

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been incidentally raised concerning the validity and effect of the conveyances of their shares, both by Mrs. Gyles and Mrs. Rugles, to the corporation; which, complicated with the length of time and other circumstances which have intervened since the conveyances were made, will demand distinct argument and consideration before they can, properly, be passed upon by the court.

It remains to be seen, how far what we have decided affects, in their present position, the actions at law which have been submitted to us. In the *first* place, it is clear, that as no legal liability for the corporate debts survives against the estates of deceased stockholders, the two actions brought by the New England Commercial Bank, and by Josiah S. Munroe, respectively, against Seth W. Macy, as administrator of Joseph Weaver, and the action brought by said bank against Samuel Allen, as executor of Samuel Allen, deceased, cannot be maintained; and, for the same reason, that the pleas, that Seth W. Macy, in his said capacity, is not joined as a party defendant to the two actions brought by said Munroe against certain living stockholders of the corporation, must be overruled. In the *second* place, that, as the stockholders who were such at the time of the contracting of a debt, are, for want of corporate property to be levied on therefor, liable for the debt as joint contractors, in the nature of copartners, this liability may be enforced against such living stockholders, and is, as against other copartners, most appropriately enforceable against them, by action at law, rather than by a proceeding in equity; and that, to defeat this right of action, it is not sufficient that the corporation should have property, in trust or otherwise, not open to seizure or levy upon execution, but that it should have property in such a condition that the execution, which must have been first obtained by the creditor, might have been levied thereon. This in effect disposes of the remaining special pleas filed in the last-named actions at law, and leaves them for trial upon the general issue. As to the two remaining actions at law, brought by the New England Commercial Bank against certain stockholders of the Newport Steam Factory, and in which the writs and declarations are missing, the actions must be dismissed unless these are found, or their loss, in some form, be supplied.

STATE v. GEORGE COLTER.

An indictment charging in one and the same count the distinct offences of entering a dwelling-house with an intent to steal, and an actual theft therein, is not on that account objectionable.

INDICTMENT charging that the prisoner, in the daytime, entered the dwelling-house of J. B. T. in Newport, "*with intent* the goods and chattels of the said J. B. T., then and there in the aforesaid dwelling-house being, then and there in the aforesaid dwelling-house feloniously to steal, take, and carry away, and one merino dress of the value of ten dollars, two skirts, each of the value of five dollars, and one muslin collar of the value of three dollars, of the goods and chattels of the said J. B. T., then and there in the aforesaid dwelling-house being found, feloniously *did steal, take, and carry away*, against the form of the statute, &c."

The prisoner, upon being arraigned, pleaded guilty, subject, however, by agreement, to the opinion of the court upon a motion to quash the indictment for joining two distinct offences, to wit: entering the dwelling-house with intent to steal, and actually stealing therefrom, in one count.

Hammond, for the prisoner, cited Archbold's Crim. Pract. 95. *J. B. Kimball*, attorney-general.

1. The indictment is not bad for duplicity. The practice of including in a count for *burglary* a charge of *larceny*, has long existed both in this country and England, and has been approved by the highest authority. The principle governing such indictment is applicable to this case. 1 Hale, P. C. 560; 2 East, P. C. 514, 520, note; *Rex v. Furnival*, Russ. & Ry. 445; *Joslyn v. Commonwealth*, 6 Metcalf, 236; *Commonwealth v. Hope*, 22 Pick. 1; *Commonwealth v. Tuck*, 20 Pick. 356; *State v. Squires*, 11 N. Hamp. 37; *Jones v. State*, 11 N. Hamp. 269; *State v. Crocker*, 3 Harr. (Del.) 554; *State v. Grisham*, 1 Haywood (N. C.) 12; 1 Russ. on Crimes, 827; 1 Chitty Crim. Law, 252; 2 Archbold's Crim. Pract. &c., 329-332.

2. If, however, two distinct offences are charged in the same

6	195
27	145

6	195
29	137

State v. Colter.

count, or in different counts, the court will neither quash the indictment nor compel the prosecuting officer to elect upon which count or charge he will try the defendant, unless the separate charges grow out of different and distinct transactions, so that upon the trial the prisoner will be confused, or the attention of the jury distracted. *State v. Flynn*, 26 Maine, 316; *Kane v. People*, 8 Wendell, 211; *Commonwealth v. Gillespie*, 7 Serg. & Rawle, 476; *Dowdy v. Commonwealth*, 9 Gratt. 732, 733; 1 Chitty Crim. Law, 249.

3. Upon a general verdict of guilty in a case like this, the court will pass sentence for the greater offence charged. Cases cited above under Point 1. Rev. Stats. ch. 222, § 26.

AMES, C. J. It is a rule in criminal pleading, as well as of pleading in cases of tort, that it is sufficient if part only of the allegation stated in the indictment be proved, provided that what is proved affords a ground for maintaining the indictment, supposing it to have been correctly stated as proved. 1 Chitty Crim. Law, 250; *Ricketts v. Salwey*, 2 B. & A. 363, per *Abbott*, C. J. Hence, the joinder of distinct offences in the same indictment is neither cause for demurrer, nor for a motion in arrest of judgment, but only for a motion to quash, which is always addressed to the discretion of the court. 1 Chitty Crim. Law, 253. It is true, that in cases of felony, no more than one distinct offence or criminal transaction at one time, should regularly be charged upon the prisoner in one indictment, lest it should confound him in his defence or prejudice him in his challenges to the jury; but where, as in this case, the indictment contains a true statement of one criminal transaction, as confessed by the plea, to wit: that the prisoner not only entered with intent to steal, but did actually steal, there seems to be no basis whatever, in the fact that two offences are thus charged, for his motion to quash to rest upon. Indeed, in burglary, that the same count charges a breaking and entering with intent to steal, and an actual theft in the dwelling-house, has never been deemed objectionable; but was advised by Lord Hale, to insure a conviction of theft, if the proof justified it, when it might not justify a conviction of burglary. 1 Hale, P. C. 559, § 5. This mode of charging merely so widens the allegations of the count,

as to admit, what is so common, a conviction of a lesser offence, included in the charge of the graver one, if the proof should fall short of the latter. In burglary, where theft was the criminal purpose, so well settled has the practice in this respect been, since the days of Lord Hale, that in *Rex v. Furnival*, Russ. & Ryan, Cr. Cas. 445, the doubt resolved against the prisoner was, whether a conviction was good upon an indictment which charged a burglarious entry and an actual theft, without charging also an intent to steal, — an actual theft having been proved. Although in this case the judges supported the conviction, they considered that it was better, in cases of burglary of this sort, to charge the intent to steal as well as the stealing, according to the advice of Lord Hale. No distinction, favorable to this motion, can be made between an indictment for burglary, and the indictment before us; and the motion, therefore, must be denied, and the prisoner sentenced.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT

6	108
12	130
6	198
27	520

FOR THE
COUNTY OF KENT, SEPTEMBER TERM, 1859,
AT EAST GREENWICH.

PRESENT :

HON. SAMUEL AMES, CHIEF JUSTICE.
HON. GEORGE A. BRAYTON, } JUSTICES.
HON. ALFRED BOSWORTH, }

RHODE ISLAND EXCHANGE BANK v. CHRISTOPHER HAWKINS.

Where a court of law is unable to relieve a garnishee who, by pure accident or mistake, has been prevented from thereby accounting under oath in his own discharge, a court of equity will, under its well-settled jurisdiction, grant him relief; but not where neglect of the garnishee or of his agent is distinctly traceable as the cause of the omission to account.

Where a bank, served as garnishee, advised with an attorney retained generally in their business, as to what they must do, and were told to make an affidavit, but did not request the attorney to attend to the matter for them, or by informing him what they had to disclose, or by leaving the copy of the writ with him, signify to him that they expected his services; *Held*, that they had no right to expect that he would act for them in the matter, especially, as before the time of accounting had passed, the cashier, who by law was to make the affidavit, knew that the attorney was acting for the plaintiff in the cause; and that an omission to account under such circumstances was too plainly traceable to neglect, to warrant equitable relief to the bank, when sued as a garnishee neglecting to account.

BILL IN EQUITY to enjoin a suit at law, commenced by the respondent against the complainant corporation, as a garnishee

who had neglected to account under oath before judgment had been rendered in the principal suit; the bill alleging that the complainant was prevented from accounting by accident and mistake, and praying that the judgment might be opened and the complainant permitted to account as garnishee, in the principal suit, with the same effect as if judgment had not been rendered therein.

The cause went to proof; and on the part of the complainant bank the cashier deposed, in substance, that on the last of May or 1st of July, 1855, he was instructed by the board of directors to employ an attorney, who had then come to reside in the village of East Greenwich, in which the bank did business, to act as the general counsel of the bank and to transact all its legal business; that shortly afterwards, meeting the attorney at the railway station in the village he engaged him according to his instructions, although no general retainer was demanded or paid; the attorney then, or a few days after, informing him that there was one case, which he named, in which he could not act for the bank, having been previously retained by the opposite party; that after the bank was served with copies of writs for the purpose of attaching in its hands the personal estate of Gardner & Brother, he mentioned the fact to the attorney, and inquired of him what was necessary to be done. That the attorney replied, "You are garnishees, and must make affidavit;" and nothing more was done or said on either side, the cashier supposing, as he swore, that when any matter required his personal attention in the cases, the attorney would send into the bank, and let him know it.

It appeared that the attorney himself brought the suit in which the bank was served; that the suit was entered at the August term of the court of common pleas for the county of Kent, 1855, and was continued to the next February term of the court, 1856, with leave to the garnishee to make affidavit, at which term, the counsel of Gardner & Brother having withdrawn his appearance, judgment was entered up by default against the defendants,—the complainant not having made affidavit or received any notice from the attorney to do so. The cashier admitted, that during the pendency of the suit he might have

Rhode Island Exchange Bank v. Hawkins.

heard that the attorney was acting for the plaintiff in the suit,—now respondent to the bill,—but swore that he did not suppose that there was any impropriety in the attorney's also acting for the bank in its character of garnishee in the suit, as he had done in another suit brought by him, in which the bank was served as garnishee. The president and a director of the bank deposed also to the instructions to the cashier to retain the attorney in the business of the bank, and to his having subsequently transacted what law business the bank had; and that they relied on him to attend to their interests as garnishees in the suit in question.

On the other hand, the attorney deposed that he had no recollection of ever having been generally retained as the counsel for the bank, by the cashier or any other officer, and that he never charged the bank with such retainer, as he should have done, if he had understood that he was so retained; that he brought the suit for the respondent against Gardner & Brother, in which the bank was served, and acted openly and solely for the respondent in it, in court; and had no recollection of ever having been requested by the cashier, or any other officer of the bank, to draw the affidavit of the bank as garnishee, or in any way to act for it on the suit; or of having any conversation with the cashier or other officer of the bank about the suit until after the judgment was obtained. He admitted that he had done business for the bank for which he had rendered his account; and explained his having drawn an affidavit for the bank as garnishee in a suit which he had commenced, by the fact, that the suit was that of the president of the bank, and that he had requested him to prepare the bank's affidavit as garnishee.

W. H. Potter, for the complainant.

Courts of equity have jurisdiction to grant new trials in actions at law, where, from accident or mistake, the party has been deprived of an opportunity of making his defence in a court of law. 1 S. & M. Ch. R. 466; *Joslin v. Coffin*, 5 How. (Miss.) 537; 1 A. K. Marsh. 237; Walker, Ch. R. 505; *Cochran v. Street*, 1 Wash. (Va.) R. 79. For what is accident, in the sense of a court of chancery, in granting new trials, see 1 Story, Eq. Jurisp. §§ 78, 109; and for what is mistake, *Ib.* §§ 110, 140, and notes.

Rhode Island Exchange Bank v. Hawkins.

T. C. Greene & R. W. Greene, for the respondent.

1. It is not within the power of a court of equity to grant the relief prayed for, in the case set forth by the plaintiffs' bill. The act of the general assembly making the garnishee, who fails to make affidavit, liable for the payment of the debt, is as binding on a court of equity as on a court of law. To relieve the garnishee from such liability is to alter a law of the general assembly, and is the exercise of legislative power in the form of a decree of a court of equity. See 2 Story, Eq. Jurisp. § 1326; *Gorman v. Low*, 2 Ed. Ch. R. 324; *Chandler v. Crawford*, 7 Ala. 506; *Peachy v. Somerset*, 1 Strange, 446; *Keating v. Sparrow*, 1 Ball & B. 367. No case can be found in which a court of equity has relieved after a statute liability or penalty, accrued on account of accident or mistake, but only when accrued through fraud. Example, statute of limitations. No case is produced by opposite counsel. 2 Story, Eq. Jurisp. § 1326.

2. The plaintiffs never retained an attorney to act in their behalf in the case of *Christopher Hawkins v. Benj. W. Gardner*, surviving partner of the firm of Gardner & Brother.

3. If they had retained an attorney it would be no ground for relief. The negligence of the attorney is the negligence of the client. *Patterson v. Mathews*, 3 Bibb, 80; S. C. 2 U. S. Eq. Digest, 367, § 45; *Burton v. Wiley*, 26 Verm. (3 Deane,) 430; *Wynn v. Wilson*, 1 Hemp. 698; S. C. 11 Am. Dig. 325, § 40; *Yates v. Munroe*, 13 Illinois, 212. A new trial ought not to be granted on account of the neglect of the agent or attorney applying for it. 3 U. S. Dig. 581, § 787, and cases cited; *Barry v. Wilbourne*, 2 Bailey, 91; *Leedom v. Pancake*, 4 Yeates, 183; *Hawley v. Blanton*, 1 Mis. 49; *McLane v. Harris*, Ib. 700; *Ditto v. Commonwealth*, 2 Bibb, 17; *Smith v. Morrison*, 3 A. K. Marsh. 81; *Green v. Robinson*, 3 How. (Miss.) 105; *Le-grand v. Baker*, 6 Monr. 235; S. C. 2 Supp. U. S. Dig. 451, § 479; *Steigers v. Darby*, 8 Mis. 679; *Field v. Matson*, Ib. 686.

4. The failure of the bank to make their affidavit was caused by the carelessness and negligence of their own officers. The bank, like all other parties, is bound to know the law. Igno-

rance is no excuse. This rule applies with peculiar force to the plaintiffs. Boards of directors and cashiers have more means of knowledge than individuals. The affidavit required by law is a simple thing. It related to facts within their own knowledge and in their own books. Their statement would have been conclusive, unlike defences depending on the testimony of witnesses. According to their own account, they employed no one to draw their affidavit, and had no right to expect that he, whom they knew to be the attorney for the plaintiff, would act for them.

AMES, C. J. The first objection to the relief sought by this bill is, that the court has no power to relieve a garnishee who has been prevented by accident from accounting upon oath, because this would be to relieve against a statute penalty, in derogation of the statute itself; in effect, to set up the decree of the court against a statute which was designed to bind it. The objection is founded upon a misconception of the statute relating to garnishment, of the ground upon which relief is here asked, and in the spirit in which it is urged, of the nature of equitable jurisdiction itself.

The statute of foreign attachment does not impose upon the garnishee the payment of the judgment recovered against the principal debtor, as a penalty for not disclosing the amount of the debtor's property in his hands at the time of the service, but proceeds upon the idea, that not disclosing, he *has* such property in his hands to the amount of the judgment; and if it does impose it as a penalty, the penalty attaches, as we shall presently consider, not upon mere non-disclosure, but upon the *neglect* or *refusal* to disclose. The bill does not seek relief as from a penalty or forfeiture, which is a distinct head of equitable jurisdiction, but is founded upon the well-known jurisdiction of the court over cases of accident and mistake; and asks the aid of the court because of an *accident* which has befallen the complainant, of which it is against conscience that the respondent should avail himself, even through the instrumentality of a court of law. In granting relief in such a case, the court, so far from contravening the statute, merely follows out its spirit and meaning, — acting, too, because, as a court of law, it was

powerless at the time this bill was filed, to do that which the equity of the statute required.

The statute provides, that if any person served with the copy of a writ as garnishee "shall *neglect* or *refuse* to render an account on oath as aforesaid of what personal estate of the defendant" he had in his hands at the time of the service of such copy, such garnishee shall be liable to satisfy the judgment that the plaintiff shall obtain against the defendant in such writ, to be recovered by a special action on the case.

The garnishee, who *by pure accident* has been deprived of his right to disclose in his own relief, can, with no more propriety, be said to have *neglected* or *refused* to account, than he who has been defrauded of his right. Now, the argument for the respondent concedes the power of the court to relieve a garnishee who has been defrauded of his right to disclose, as perfectly accordant with the statute; and this is, logically, a concession of the whole objection.

It is equally *the law* which gives relief, in such a case, whether administered by a court of equity or by a court of common law; the partition of jurisdiction between the two tribunals, or, as here, between the two sides of the same tribunal, attributing to each its distinct remedial powers, according to a mere rule of custom or convenience. Had the complainant corporation been a *party* to the suit in which it was served as garnishee, or had our statute of new trials, formerly, as now, included *garnishees* with parties, as entitled to relief at the hands of a court of law from a judgment obtained by accident or mistake, the matter of this bill would have been properly the subject of a mere motion on the law side of the court. It is because this court decided upon such a motion, that it had no power under the statute of new trials, as it formerly stood, to relieve a garnishee who had not answered the suit in which he was served by opening the judgment so that he might account under oath, that a resort to the equity side of the court, in this case, became necessary; and the garnishee here seeks relief, in equity, upon the same ground of accident and mistake, set down in the statute as good cause for the granting of a trial or new trial to a *party* by a court of law. We can see no reason, therefore, for jeal-

ousy of the court for exercising the same jurisdiction by their general powers, in one name, in favor of a garnishee, which they have been expressly authorized by statute to exercise under another, in favor of a party. In either case, the court should see that it did not exceed its powers; but it would be difficult for it to see how the exercise of the same power, as a court of equity, was more to be feared, or more derogated from the just powers, or conflicted with the enactments, of the legislature, than when exercised by the court as a court of law.

It is hardly necessary, at this day, to discuss the settled right of a court of equity to enjoin the execution of, or proceedings under, a judgment at law, whether founded upon statute or common law, in order to administer equities, which the court of law, where the execution is sought or the proceedings are had, cannot notice. We have no occasion to open a controversy which has been settled ever since the time of James I., or to do more than to refer to the celebrated judgment of Lord Ellesmere in the *Earl of Oxford's case*, and to Mr. Hallam's account of the termination of the dispute upon this subject between Lord Ellesmere and Lord Coke. *Earl of Oxford's case*, 1 Ch. R. 1; *S. C. Comes Oxon. v. Neeth*, Toth. 126; 1 Hallam's Const. Hist. of England, 471, 472. Since that time, at least, the distinction between legal and equitable rights, and the jurisdiction of the chancery, where the former only are embodied in a judgment at law to prevent them from being wrested to purposes of injustice, has been universally acknowledged and approved, as but a mode of doing complete justice — the end of all tribunals, — and which supposes of course, due attention to all the rights of the litigants, by whatever name they may be called. The rule which governs upon this subject, both in England and in this country, cannot be better expressed than in the language of Chief Justice Marshall in giving judgment in the case of the *Marine Ins. Co. of Alexandria v. Hodgson*, 7 Cranch, 332: "Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may be safely said, that any fact which clearly proves it to be against con-

science to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which *he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence of himself or his agents, will justify an application to a court of chancery.*" See 2 White and Tudor's Leading Cas. in Equity, Part 2, pp. 83-114, Hare and Wallace's notes to the Earl of Oxford's case, for a collation of English and American cases.

As the above rule supposes, it is a maxim of the chancery, and a very old one, that if a man comes to be remediless at the common law by his own negligence, he shall not be relieved in equity; Broke's Abr. Conscience, pl. 23; 22 Edward 4, 6, b; 4 Vin. Abr. Chancery, note 2; and if this were not so, our own statute would, as we have seen, by its very terms cut off a garnishee, *neglecting* to answer, from such relief.

Has, then, the complainant corporation been deprived of the power to answer as garnishee, in the suit at law mentioned in the bill, by pure accident or mistake; or, as the remaining objection to relief in this case supposes, by its own neglect; or, what is the same thing, the neglect of its officers or agents; against the consequences of which, for the reason above given, this court cannot relieve?

The accident or mistake set up by the complainants as a ground for relief, is, that an attorney, whom they had retained generally in their business, and who had advised them that they must make an affidavit, did not give them notice when to come into court to make it. They do not pretend that their cashier requested the attorney to draw their affidavit, or informed him what they had to disclose, or asked him when the disclosure was to be made, or even left with him, as significant of expected service, the copy of the writ of attachment. The proof submitted by them is, that their cashier, who by law is to make the affidavit, upon receiving from the attorney all the advice that he asked: to wit, that an affidavit must be made, took no step whatever to make it,—that having been told what his duty was, he relied, without any reason for the reliance, upon some one else, unasked, to inform him when to perform it. Admitting that the attorney who advised him was re-

tained generally in the business of the bank, which he denies, what right had the bank to expect that he would attend to business with which they had not charged him, and especially to draw an affidavit of facts which they had not disclosed to him? A general retainer merely gives a right to expect professional service when requested, but none which is not requested. It binds the person retained not to take a fee from another against his retainer; but to do nothing except what he is asked to do; and for this he is to be distinctly paid. The very case made by the complainants shows, therefore, that their cashier and agent, though advised what to do, neglected to take the proper and usual steps to do it. When to this is added, that before the time of accounting had expired, the cashier admits, that he knew that the attorney upon whom he relied was acting for the plaintiff in the suit, and, though thus put upon his guard, had no explanation with him, how can we say, that the difficulty in which the complainants find themselves arose from an accident or a mistake, in which, the neglect of themselves or of their agent bore no part? But upon the theory of the plaintiffs, that an attorney, actually retained by them, had by his negligent conduct in their business deprived them of a material advantage, how would they be advanced in a title to the relief of the court? *His* negligence, as that of their agent, would as much disentitle them to relief, as that of their cashier; their remedy, in either case, being in damages against him who by his neglect of duty had caused their loss.

We see no evidence of a fraudulent design of the attorney to obtain an advantage for his client, in this matter, at the expense of the plaintiffs; and, indeed, no such design or practice is charged in the bill. In the best view of the case for the plaintiffs which can be taken, there was a misunderstanding between their cashier and the attorney of the respondent, then plaintiff in the attachment suit, as to the attorney's acting also in the suit for the plaintiffs, who were garnisheed therein. As the result of the evidence, we can see no good reason why it should have been expected, whether he was generally retained for the plaintiffs or not, that he would, unless requested, act for them at all. He had answered, it is agreed, the only question

which was put to him, and informed them of their duty; and was never called upon by them to do anything else towards their performance of it. We cannot look upon such a case as one of unavoidable accident, or of mistake unmingled with neglect; and must, therefore, in accordance with the settled rule which governs equitable action, as well as in obedience to the statute relating to foreign attachment, order this bill to be dismissed, with costs.

STATE v. MOWRY WILLIAMS.

6	207
12	218
6	207
25	226

To convict one of being a common seller of strong or intoxicating liquors, under sections 26 and 27 of chap. 78 of the Rev. Stats., it is not necessary that he should have been twice convicted of selling in violation of section 16 of the same chapter, and a third sale by him be proved within six months of his last conviction; but proof of any three distinct sales, either to the same person, or to different persons, is sufficient to maintain the indictment; the last clause of the 27th section not being designed to limit the effect of the first clause of the section, but to ease a doubt which had arisen about a double conviction founded in part upon the same proof.

Where a witness has sworn in his direct examination that the criminal acts were done within the times laid in the indictment, and, upon cross-examination, it appears that he cannot fix the precise date of any one of them, it is permissible in reply, to re-examine the witness as to the means by which he is enabled to ascertain that the criminal acts were done within the period covered by the indictment.

Unless it appears that a party excepting to the suggestive or leading character of questions put by his opponent to his witnesses has suffered injury therefrom, a court of error, upon a bill of exceptions which does not disclose the circumstances, will hardly interfere with a matter so amenable to circumstances, and so much within the discretion of the judge trying the cause.

INDICTMENT against the defendant as a common seller of strong liquors, at East Greenwich, between the 1st day of October, 1858, and the 14th day of February, 1859.

At the trial of the indictment before Mr. Justice *Shearman*, with a jury, at the February term of the court of common pleas for the county of Kent, 1859, it appeared, that one Arnold J. Place, a witness produced on the part of the state, testified in his direct examination, that he had been a frequent purchaser of liquors of the defendant since he had kept shop in

East Greenwich, within the times laid in the indictment, both to drink on the spot and to carry away; that he could not tell the number of times he had purchased it, there were so many times; he had purchased it a number of times. On cross examination he said, that he could not give any certain dates; it was since the defendant kept the shop; he meant to say, that he had bought of the defendant since he kept his shop, and thought that it was within the times laid in the indictment. The first time he purchased of the defendant he was alone; got gin there of the defendant four or five times; had it nearly every day. Against the objection of the counsel for the defendant, the court permitted the attorney-general to reexamine the witness as to the time when the defendant kept the shop and sold to the witness, with especial reference to the times when the supreme court sat in East Greenwich, in September, 1858, and when the grand jury attended the court of common pleas there, at its February term, for the county of Kent, 1859.

Upon this reexamination, the attorney-general asked the witness, the counsel for the defendant objecting, "whether he remembered when the grand jury were in session for the February court of common pleas, 1859?" The court having admitted the question, the witness answered, "that he did." The attorney-general then asked the witness, "if the purchases were made before that time?" To this question the counsel for the defendant objected; but the court allowed the question to be put, and the witness answered, "that the purchases were made before that time."

The counsel for the defendant also requested the court to charge the jury, that they could not convict the defendant of being a common seller under sections 26 and 27, of chap. 78, of the Rev. Stats., without proof of two previous convictions for selling strong liquors in violation of sect. 16 of the same chapter, and of a like sale in violation of that section within six months of the last conviction. This charge the court refused to give, but charged the jury that any three sales of strong or intoxicating liquors, made by the defendant within the times laid in the indictment, were sufficient to maintain it.

The jury having found the defendant guilty, and he having

duly excepted to the above rulings of the court, the same were now brought to this court for the correction of alleged errors of law therein.

W. H. Potter, for the defendant.

1. Place's reëxamination was objectionable and illegal, because the questions were leading, and the testimony incompetent and irrelevant, both in substance and in the time and manner of its admission.

2. An indictment for common selling requires to be sustained by proof, that the defendant has been twice convicted of a violation of sect. 16, of chap. 78, of the Rev. Stats., and by proof, that the defendant has again violated it within six months of his last conviction.

J. B. Kimball, attorney-general, for the state.

I. The reëxamination of the witness, Arnold J. Place, was proper to explain the cross-examination. 1 Greenleaf on Ev. p. 609, sec. 467.

II. If the reëxamination of the witness was in fact as to new matter, the court had the discretion to permit it, and it is therefore no ground for a new trial. *Law v. Merrill*, 6 Wend. 268; 9 Cowen, 65; *Frederick v. Gray*, 10 Serg. & Rawle, 482; *Curren v. Conners*, 5 Binney, 488; *State v. Silver*, 3 Dev. 332; *Freleigh v. State*, 8 Mis. 606; *Brown v. Burns*, 8 Mis. 26.

III. It is not necessary for the government to prove, in order to sustain an indictment for common selling, two previous convictions of a violation of sect. 16, of chap. 78, of the Rev. Stats. and another violation of said section within six months next succeeding the last conviction. The statute does not prescribe the *only* mode of proof. Rev. Stats. chap. 78, §§ 26, 27; *State v. Johnson*, 3 R. I. Rep. 94.

AMES, C. J. The first clause of the 27th section of chap. 78, of the Revised Statutes expressly provides, that three several sales of strong or intoxicating liquors, either to the same person or to different persons, shall be sufficient to constitute the person selling, a common seller, within the meaning of the 26th section of the same statute. Under this clause of the 27th section the defendant was properly convicted; the office of the

last clause of the section being, not to limit the first, but to provide further, that although the defendant had been convicted and punished under the 16th section of the same chapter for two of the sales, he might, nevertheless, upon proof of a third sale within six months of the last conviction, be convicted thereby as a common seller. This clause was evidently added to meet the objection of a double conviction founded in part upon the same proof, which was started and discussed in *State v. Johnson*, 3 R. I. Rep. 94, and to recognize the distinction there laid down by the court, between the offence of a single sale in violation of law, and the offence of carrying on an illegal traffic in liquors, proved, under the statute, by three distinct sales in violation of it.

The other exceptions are equally untenable. The witness for the state, Place, had sworn, in his direct examination, that the defendant had frequently sold to him within the times laid in the indictment. It appearing from his cross-examination that he could not specify the precise date of any one of these numerous sales, it was quite proper that the government should be permitted in reply, to re-examine him as to the means by which he was able to ascertain that the sales were made to him by the defendant within the period covered by the indictment. We see no reason to suppose that the defendant suffered any injury from the suggestive or leading character of the last and only objectionable question in point of form, put by the attorney-general upon his re-examination of the witness, Place; and without this, should hardly attempt to interfere with a matter so amenable to circumstances, and so much within the discretion of the judge trying the cause. Both exceptions must therefore be overruled, and sentence be passed upon the verdict.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

6	211
13	164
15	272
6	211
17	544

FOR THE

COUNTY OF PROVIDENCE, SEPTEMBER TERM, 1859,
AT PROVIDENCE.

PRESENT:

HON. SAMUEL AMES, CHIEF JUSTICE.
HON. GEORGE A. BRAYTON, } JUSTICES.
HON. ALFRED BOSWORTH, }

**JOHN O'DONNELL v. THE PROVIDENCE AND WORCESTER
RAILROAD COMPANY.**

The fourth section of the "act in relation to railroads," (Dig. 1844, pp. 338, 339,) giving an action to any one injured by the neglect of a railroad company to ring the bell upon their locomotive engine for the distance, at least, of eighty rods from the place where the railroad crosses any turnpike, highway, or public way, upon the same level with the railroad, and to keep the same ringing until the engine shall have crossed such turnpike or road, was exclusively designed for the benefit of persons crossing the turnpike, highway, or public way on a level with the railroad; and hence, a person who is injured by the engine, whilst he is walking along the track of the railroad and not at any crossing, cannot recover damages against the railroad company for such injury, upon the ground that the injury was caused by their neglect to ring the bell upon their locomotive, as required by the statute.

This was an action of the case, brought against the defendants, a railroad corporation, under the third section of the "act in relation to railroads," found in the Digest of 1844, pp. 338, 339.

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The declaration, which contained two counts, in substance alleged, that the defendants, on the 25th day of April, 1857, unreasonably neglected and refused to ring, or cause to be rung, any bell upon their locomotive engine, whilst the same was passing upon their railroad, within the distance of eighty rods from the place where said railroad crosses a certain public way, to wit: Webster street, in the city of Providence, at the same level with said road, and unreasonably neglected and refused to keep said bell ringing until said engine had crossed said public way; by reason whereof, to wit: of said neglect and refusal of said defendants, the plaintiff was thrown down by said engine, and run over, and greatly injured, and his leg broken, and he was otherwise greatly injured, so that he was compelled to have his leg amputated, and his life was despaired of, and he was put to large expense in curing said injuries, &c.

Plea, the general issue.

The act under which the action was brought was, so far as applicable to it, as follows:

"Sect. 1. Every railroad company incorporated under the authority of this state shall cause a bell of at least thirty-two pounds in weight to be placed on each locomotive engine passing upon their road; and the said bell shall be rung at the distance of at least eighty rods from the place where said railroad crosses any turnpike, highway, or public way upon the same level with the railroad, and shall be kept ringing until the engine has crossed such turnpike or road.

"Sect. 2. Every such railroad company shall cause boards to be placed, well supported by posts or otherwise, and constantly maintained, across each turnpike, highway, or public way, where it is crossed by the railroad upon the same level therewith; the said posts and boards to be of such height as shall be easily seen by travellers, without obstructing the travel; and on each side of said boards the following inscription shall be painted in capital letters, of at least the size of nine inches each, 'Railroad Crossing — Look out for the Engine while the Bell rings.'

"Sect. 3. If any railroad company shall unreasonably neglect or refuse to comply with the requisitions contained in this act,

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they shall forfeit for every such neglect or refusal a sum not exceeding one thousand dollars; to be recovered in an action of debt before any court proper to try the same; one half thereof to and for the use of the state, and the other half to and for the use of the person who shall sue for the same. And the said railroad company shall also be liable for all damages sustained by any person by reason of such neglect or refusal on the part of the company."

At the trial of the case before the chief justice, with a jury, at the September term of this court, 1858, it appearing, from the evidence of the plaintiff himself, that at the time of the injury complained of, the plaintiff was walking upon the track of the defendants' railroad, and was not at any place where the railroad crossed any turnpike, highway, or public way, upon the same level with the railroad; and the proof on both sides, as to the cause of the injury, being directed exclusively to the question whether the bell of the locomotive engine which struck down the plaintiff was rung or not, the defendants requested the judge to instruct the jury, that the plaintiff had not proved his case, and that upon the facts, as proved, the defendants were entitled to a verdict.

This instruction, however, the judge refused to give; but instructed the jury, *pro forma*, that if they were satisfied, as the fair result of the whole testimony, that the defendants neglected to ring their bell as alleged in the declaration, and that in consequence of such neglect the plaintiff was injured, they should find a verdict in his favor, without reference to the place where he was, or whether he was or was not lawfully there.

Under these instructions, the jury having returned a verdict for the plaintiff for \$1,500 damages, the defendants now moved for a new trial, upon the ground of error in law in said instructions. Another ground for new trial taken by the defendants, was, that the verdict was against the weight of the evidence; but as the court did not consider this ground, it is unnecessary to detail the state of the evidence upon which the motion, in this respect, was founded.

Payne, for the motion.

Parkhurst, against it.

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BRAYTON, J. The plaintiff does not allege that the defendants conducted the engine carelessly and negligently, and that by reason of such carelessness and negligence, the plaintiff was knocked down and injured, but in the language of the statute, that the defendants unreasonably neglected and refused to ring any bell upon a locomotive engine of theirs passing upon their railroad, at the distance of eighty rods from the place where said railroad crossed certain public highway upon the same level with the railroad, &c., by reason whereof the plaintiff was thrown down and injured.

If the defendants have violated any duty owing from them to the plaintiff, and by means or in consequence of that violation the plaintiff has suffered injury, he has a right to compensation and damages at the hands of the defendants for such injury. In the language of the books, an action lies against him who neglects to do that which by law he ought to do, (1 Vent. 265; 1 Salk. 335,) and that, whether the duty be one existing at common law, or be one imposed by statute. In order, however, to a recovery, it is not sufficient that some duty or obligation should have been neglected by the defendants, but it must have been a neglect of some duty or obligation to him who claims damages for the neglect. In 1 Comyns's Digest, Action upon Statute, F, it is said, "In every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of the wrong done to him contrary to said law," confining the remedy to such things as are enacted for the benefit of the person suing.

The obligation resting upon adjoining owners of lands to maintain portions of the partition fences between them is put as an example; whether the duty be one arising from prescription, as in England, or imposed by statute, as in this country. *Rust v. Low & another*, 6 Mass. 90; 1 Vent. 265.

In 74 E. C. L. 160, is the case of *Ricketts v. East and West India Docks, &c. Company*, where the defendants, a railway company, were by statute required to maintain a fence, for separating the lands taken for the road from the adjoining lands not taken, and protecting such lands of the owner or occupier from

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cattle straying thereout, the cattle of the plaintiff crossed from his own close into one adjoining the railroad, and thence, through defect of the defendant's fence, upon the railroad, and were killed. The plaintiff alleged the neglect to maintain the fence by the defendants, whereby the cattle passed upon the track of the railroad. The court held, that though as against the adjoining owners of the land the company were obliged to maintain a fence, no such duty was imposed upon them towards the plaintiff, who was not an adjoining owner or occupier, and that he had no right to recover for the loss of his cattle.

The proof in the cause, as given by the plaintiff was, that he, the plaintiff, was not, at the time the injury happened, either at the place where the railroad crossed the public highway on the same level, nor upon the highway which was so crossed by the railroad, but at a very considerable distance from any such highway, and upon the track of the railroad. The judge before whom the cause was tried, upon this state of the evidence, charged the jury that if they were satisfied, as the fair result of the whole testimony, that the defendants neglected to ring the bell as alleged in the declaration, and that in consequence of such neglect the plaintiff was injured, they should find a verdict in his favor, without reference to the place where he was, and without reference to the question, whether he was, or was not, lawfully there. In effect, he instructed the jury that they need not regard the fact that the plaintiff was not upon the highway, or at the crossing referred to. This direction to the jury assumes, that the duty imposed upon the defendants of ringing the bell of the locomotive engine the whole distance of eighty rods from the place of crossing on the same level, was due from the defendants alike to all persons, and not merely to those who had occasion to travel upon the public highway, and the jury must have understood from the charge that such was the law of the case.

Whether this instruction was, or was not erroneous, depends upon the construction to be given to the statute. If the thing enacted here, viz., the ringing of the bell, was enacted for the benefit of persons in the position of the plaintiff, then the in-

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structions were correct. If, on the other hand, it was enacted for the benefit of those only who were travellers, and had occasion to pass upon the highway, and crossed it at grade, then was the instruction erroneous.

Now in looking at the provisions of this statute, we think the purpose and object of them are reasonably clear. The act does not require the bell to be rung at or near the approach to any place where any private passway crosses the railroad, nor near any place where the railroad crosses even a public highway above or below the level of such highway, but only near highways or turnpikes which the railroad crosses on the same level, and where only there would be danger of a collision of the train with individuals, or their horses, carriages, or teams. The bell is required to be rung for the distance of eighty rods before coming to such crossings. From the usual speed with which trains move, the time between the first signal from the bell, till the engine would cross the public highway, would be barely sufficient for reasonable notice to persons approaching such crossing, — from thirty to forty-six seconds. It is quite evident that it could not have been intended to warn people elsewhere. At such places it was necessary to give notice to travellers approaching the place of crossing, and before they were upon the track, that they should not venture there while the train was approaching; and the bell was required to be sounded that they might have such notice. But the other provision of the act contained in section 4 is still more positive. The sign is to be placed at the highway, and at the place of crossing. It is to be in large letters, so as to be most likely to attract the attention of a passing traveller, and which he could not well fail to see. It is provided that it shall be placed so high as not to obstruct travel, and at such height as to be easily seen by travellers, that is, by travellers on the public highway. This language could not have been used with any propriety unless the notice required had been intended for the benefit of such travellers; and other language would have been used, if the act had been designed for the benefit of persons upon the track of the railroad at other places than the crossing of such highway.

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We are all of opinion that this enactment was not for the benefit of persons in the situation of the plaintiff, and that the direction given to the jury was, in this regard, erroneous; and for that cause the verdict rendered for the plaintiff must be set aside.

The conclusion to which we have come upon this point renders it unnecessary to consider the other ground upon which a new trial is asked, viz.: that the verdict is against the evidence in the cause.

A new trial in this case could be of no service to either party. The plaintiff counts upon the neglect of a duty prescribed by statute, and upon that alone; and that duty not being enacted for his benefit, he cannot claim damages for the neglect of it, and can have no right to recover against the defendant; and for this cause,

Judgment, notwithstanding the verdict, must be for the defendants for their costs.

JOHN THOMPSON v. JOHN S. IDE.

The payees of a note, who were New York stockbrokers, had received it from the defendant as collateral security for any balance which might accrue in their favor, in the course of his stock transactions, carried on through them; and a large balance, far exceeding the amount of the note, had accrued in their favor growing out of stock transactions not proved to be impeachable under the New York statutes against stock-jobbing and gambling in stocks. In this state of things the plaintiff, who was an execution debtor of the defendant, and for the purpose of attaching thereon in the hands of the plaintiff's attorney the amount which he might pay on the execution, received the note indorsed in blank by the brokers, after it was overdue, under a contract to sue it in his own name, with the right to take to his own use, at the rate of fifty per cent., so much of the judgment he should recover as he might wish to use, — he paying the costs of collection on what he might take, — and to transfer the balance of the judgment to the brokers.

Held, in a suit on the note, that the transfer of the note could not be objected to by the defendant as void for champerty; and that, although the note was subject in the hands of the plaintiff to all the defences that it would have been had it been sued by the brokers, as well from the character of the transfer as because transferred when overdue, — yet that it was supported by the legal portion of their balance of account against the defendant exceeding its amount, — although a portion of the balance grew out of stock transactions carried on by them for the defendant in which the sellers had

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not the stock to deliver; there being no proof that a general scheme was entered into between the brokers and the defendant to violate, in their transactions, the laws of New York in regard to stock-jobbing and gambling, or that the brokers were cognizant of the objectionable portion of the defendant's stock transactions, that the sellers had not stock to deliver.

ASSUMPSIT by indorsee against the maker of a negotiable promissory note for \$5,000, dated New York, June 9, 1857, and payable to the order of E. Whitehouse, Son & Morison, ninety days after date.

At the trial under the general issue before the court, to whom by agreement the case was submitted in fact and law, it appeared in substance that Ide having recovered judgment against Thompson for a considerable sum of money, execution for which was in the hands of the officer, Thompson paid the amount to the attorney of Ide, and forthwith attached the amount so paid in his hands upon the writ in this suit; he, Thompson, having acquired the control of the note here sued for that purpose, under an agreement with E. Whitehouse, Son & Morison, the payees of the note, the purport of which appeared from the two following receipts:—

“ New York, Dec. 12, '57.

“ We have this day transferred to John Thompson, John S. Ide's note for 5,000 dollars, dated June 9th, '57, at ninety days, to be sued, and judgment recovered in his name, upon the conditions set forth in his receipt to us of this date.

(Signed)

“ E. WHITEHOUSE, SON & MORISON.”

“ New York, Dec. 12, 1857.

“ Received of E. Whitehouse, Son & Morison, John S. Ide's note for \$5,000, dated June 9th, '57, at ninety days. I am to sue it in my own name, or otherwise; and not to use their name, and to pay them for such amount thereof as I may use fifty cents on the dollar, and transfer to them the judgment for the balance not used by me;— the judgment is to be subject to my control until this transfer is made; and for the amount to be paid by me under this arrangement I am to give them satisfactory paper at four months, dating from the time that

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such amount shall be actually secured and taken by me; I to pay costs of collecting on the amount I use.

(Signed)

"JOHN THOMPSON."

The note in suit was originally made and delivered by the defendant to E. Whitehouse, Son & Morison on the 9th day of June, 1857, as collateral security for any balance which might accrue to them against him, whilst carrying for sixty days for him stocks then held or coming due on contract, they acting for him as his brokers in the purchase and sale of stocks for him in the New York market. Much evidence was submitted to the court for the purpose of showing that these transactions were stock-jobbing and wagering transactions on the prices of stock; and that for that cause the consideration of the note was illegal and void under the statutes of New York, where the note was made. The transactions of the firm of E. Whitehouse, Son & Morison for the defendant, were numerous, and the final balance of account in their favor against him for which the note sued stood as security was large, being some \$9,800; and it appeared that the differences due to them on stock-transactions not proved to be illegal, would more than absorb the amount of the note and interest; and although one or two of the transactions giving rise to a portion of the balance were of an objectionable character, the result of the proof was, evidence being submitted on both sides, that E. Whitehouse, Son & Morison were not proved to have been cognizant that the sellers did not own all the stocks which they contracted to deliver to them for the defendant.

Pitman, with whom was *Payne*.

1st. The transfer of this note by E. Whitehouse, Son & Morison to the plaintiff was void for champerty, and conveyed no title. 2 *Parsons on Contracts*, 263; *Halloway v. Love*, 7 Porter (Ala.) Rep. 488; *Martin v. Amos*, 13 Iredell, 201; *Byrd v. Odem*, 9 Ala. 764; *Small v. Mott*, 22 Wend. 405; *Saterlee v. Frazer*, 2 Sandf. Sup. Ct. Rep. 141; *Benedict v. Stewart*, 23 Barb. 424.

2d. The note itself in the hands of E. Whitehouse, Son & Morison is void under the statutes of New York directed

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against stock-jobbing and gaming. Rev. Stats., N. Y., art. 2, §§ 6, 7, p. 116, (ed. of 1852); Ib. Part 1, tit. 8, ch. 22, § 8; *Dennison v. Cook*, 12 Johns. 376; *Frost v. Clarkson*, 7 Cowen, 24; *Staples v. Gould*, 5 Sandf. Sup. Ct. Rep. 411, 415; S. C. 5 Selden, 520. See also *Falkimer v. Brinckerhoff*, 20 Johns. 397; *Austin v. Bell*, Ib. 449; *Leavitt v. Blatchford*, 5 Barb. 9, 37, n.; *Jarvis et al. v. Peck et al.* Hoff. Ch. R. 479, 486; *Bank of U. S. v. Owens et al.* 2 Peters, 538; *Burt v. Place*, 6 Cowen, 431; *Nellis v. Clark*, 20 Wend. 24, 27; S. C. 4 Hill, 424. As to the act against gaming, see *Grizewood v. Blane*, 20 Eng. L. & Eq. Rep. 290. The plaintiff having, as appears by his receipt, bought the note when overdue, it is subject in his hands to this defence.

3d. As Thompson received the note three months after it was due, he took it subject to the same equities under which it was held by E. Whitehouse, Son & Morison, as collateral security merely, for their balance against Ide under a special agreement to carry certain stocks for him for sixty days, which the evidence shows that they broke; and if this were not so, they had no power to part with the collateral until they had first demanded their balance of Ide, and notified him that they were about to sue the security to satisfy it. *Cortelyou v. Lansing*, 2 Caines's Cas. in Error, 200; *McLean v. Walker*, 10 Johns. 471; *Garlick v. James*, 12 Ib. 146; *Dykers v. Allen*, 7 Hill, 497; *Stearns v. Marsh*, 4 Denio, 227; *Wheeler v. Newbold*, 2 Smith's Cas. on Appeal, 393; *Morris Canal and Banking Co. et al. v. Fisher*, 1 Stockt. Ch. R. 667; Story on Prom. Notes, § 284.

Currey, for the plaintiff.

There was no champerty. The plaintiff took a legal title to the note, with a right to purchase such portion of the judgment recovered as he might need, at a stipulated rate, he paying the costs on such portion as he might purchase. 4 Blacks. Com. 134; 2 Parsons on Contracts, 262; *Falkimer v. Brinckerhoff*, 3 Cowen, 647-649. Except in one instance there is no proof that the sellers had not power to transfer the stock sold, and in no instance are the brokers affected with knowledge that the sellers did not own the stock which they contracted to deliver. *Frost v. Clarkson*, 7 Cowen, 24.

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AMES, C. J. Upon examination, we can find no case in which the transfer of a negotiable promissory note has been held to be void for champerty, and do not feel disposed to make such a case under the facts here disclosed to us. The plaintiff took from E. Whitehouse, Son & Morison the legal title to this note of which they are the payees, by their delivery of it to him with their indorsement in blank. As their mere agent and trustee he might have maintained an action upon it against the defendant, subject to all defences to which it would have been liable in their hands; and the defendant, if *they* were content, could not object to his want of beneficial interest. But the plaintiff, in addition to his legal title, has stipulated, at a certain price and mode of payment, for such an amount of the judgment he might obtain as he might be able to use; he to pay the costs of collection on such amount. Had he bought half, or the whole of the note at such rate, certainly the contract would not have been champertous; and we cannot see why it should become so, because at a fixed rate he is entitled, under his contract, to an election as to the portion he will make his own; he paying only so much of the costs of collection as will be proportionate to the amount he shall conclude to take. He unquestionably took a transfer of it to sue for the common benefit of himself and the transferrers; the amount of the interest of each in the judgment, and of the costs which each should pay for obtaining it, to depend on the amount of the judgment which he should so use and make his own at the agreed rate. Considering that the subject of this contract is a chose in action which the policy of the law allows to be legally assignable, we do not feel disposed to fetter this leading quality of such property by nice inquiries or refined distinctions. The rights of the defendant, at least, are fully protected by holding under such a contract of transfer, as well as because the plaintiff purchased the note when overdue, that in his hands it is subject to all the equities between the defendant and the payees, E. Whitehouse, Son & Morison.

It is argued that these equities require us to hold the note void under the statutes of New York, where it was made, against stock-jobbing and gambling. The statutes in question apply

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only to cases where neither party intends to deliver or accept the stock or shares bargained for, but merely to pay differences, according to the rise or fall of the market, at the time when the bargain requires the differences to be adjusted. It is said that E. Whitehouse, Son & Morison acted as the defendant's brokers in such gambling transactions, and took the note in question as security for any balance which might accrue to them therein. The evidence shows a large balance, far exceeding the amount of this note, due to these brokers on account of the stock transactions of the defendant carried on through them; but, except in one or two instances not materially affecting the balance, fails to prove that the transactions were of the illegal character supposed; and, unless indeed we are to follow our own conjectures rather than the evidence, fails to show, even in the excepted instances, that the brokers were aware that the sellers of the stock to the defendant through them had it not to deliver, when it might be called for. There being no proof of any general scheme between his brokers and the defendant to violate the laws of New York directed against stock-jobbing and gambling in stocks; and their balance being far more than sufficient to require the application to it, for their reimbursement, of the whole amount of this note, we can see no reason why they should not recover the whole of it from the defendant, and none, therefore, why the plaintiff should not, suing and acting in this suit, as he does, partly for himself and partly as their agent and trustee.

The evidence clearly proves that the stocks of the defendant sold by his brokers at a loss, although not carried by them sixty days, were sold by his direction; and that he never objected until this suit, though the account was duly presented to him, to the balance now claimed. By the very form of the collateral note the brokers were empowered to transfer it; which distinguishes this case from those cited for the defendant where no such power accompanied the pledge; and the rights of the defendant are sufficiently protected by holding, as we do under the circumstances of this case, that the plaintiff, as indorsee of the note, can recover no more thereon than the defendant's brokers would have been entitled to do according to the terms

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of their agreement. The amount of their balance equally limits his right of recovery and theirs; but as this exceeds the amount of the note and interest, let judgment be entered for the plaintiff for this latter sum.

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PHILIP L. MATHEWSON v. TILLINGHAST SHELDON,
Administrator.

Where a claim allowed by the commissioners upon the estate of a deceased insolvent is stricken by the administrator from the commissioner's report, and the claimant recovers, in an action at common law, judgment for his claim or any portion of it, the practice is to order the plaintiff's costs, as well as debt, to be added to the commissioner's report; the case falling within the spirit, if not the letter, of sect. 14, ch. 158, of the Rev. Stats. as to the disposition of the plaintiff's costs.

MOTION for an execution for costs. The plaintiff, who was a claimant against the estate of Benjamin C. Olney, late of Johnston, deceased, which had been represented insolvent, presented his claim to the commissioners who were appointed on said estate, who allowed it against the same. The defendant, as administrator on the estate struck the claim out of the report, and compelled the plaintiff to bring a suit at common law, who, after two trials recovered judgment against the administrator on his claim, less twenty dollars, the amount allowed by the commissioners. Notice had been given by the administrator that when the plaintiff moved to have the amount of his judgment added to the commissioner's report, an objection would be made to having the costs added thereto; whereupon motion was now made by the plaintiff that the court award to him an execution against the administrator for his costs of suit.

Lapham, for the motion, cited ch. 190, sect. 1, of the Rev. Stats. allowing costs to the prevailing party in all civil causes at law where not otherwise provided; insisting that there was no special provision for this case.

James Tillinghast cited ch. 158, sects. 11, 12, and 13, to show, that in striking out the plaintiff's claim from the commission-

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er's report, the administrator had exercised a power conferred upon him by statute; and, as the jury had disallowed a portion of the plaintiff's claim, their verdict had justified him in so doing. He cited ch. 190, sect. 5, of the Rev. Stats. to the discretion of the court in all actions of assumpsit, trespass, and trespass on the case, in which judgment is rendered on appeal, to award costs for or against the plaintiff or defendant, or for neither, according to the circumstances of the case; and urged, that under the circumstances of this case the court should allow the plaintiff no costs whatever.

The court refused the motion, and ordered the plaintiff's costs to be added, together with the amount of the claim ascertained by judgment, to the commissioner's report; holding the case to be within the spirit, if not within the letter, of section 14, ch. 158, of the Revised Statutes, and adding, that the practice had always been in such cases thus to dispose of the costs.

RHODE ISLAND & CONNECTICUT TURNPIKE SOCIETY v. ALBERT
W. HARRIS & others.

The toll-rate clause in the charter of a turnpike company provided, that for each passage over the company's road, which was a post-road, "a coach, chariot, or phaeton," should pay a toll of thirty-three cents, but a "mail-stage" only six cents. *Held*, that in the sense of the charter, and for the purpose of ascertaining the rate of toll, a coach was a "mail stage," when it actually carried the public mail over the road under a temporary arrangement, fairly made with the post-office department, through a deputy postmaster, for the public convenience, and not for the mere purpose of evading the higher rate of toll; and that it was not competent for the company to insist that the contract was not in writing, or did not in the manner of making it conform to the directions of the acts of congress, with regard to regular mail contracts, for the purpose of exacting the higher rate of toll.

ASSUMPSIT to recover the sum of one hundred and twenty-nine dollars and thirty-six cents for tolls due from the defendants for the passing of their daily stage-coach over the plaintiffs' turnpike road from the 25th day of September, 1855, to the 10th day of May, 1856. The charge was at the rate of

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thirty-three cents per passage. Plea, the general issue, and tender of \$30.21, being for the same number of tolls at the lower rate of six cents per passage; the plaintiffs accepting the sum tendered in part only, and pursuing their action for the difference between the amount tendered and the amount claimed.

At the trial of the cause before Mr. Justice *Shearman* with a jury, at the December term of the court of common pleas for the county of Providence, 1858, it appeared, that in 1803, the plaintiffs were incorporated by the general assembly for the purpose of establishing and maintaining a turnpike road from Providence to the Connecticut line, through the towns of Johnston, Scituate, and Foster; and that by the third section of their act of incorporation it was provided that amongst other tolls, they should be entitled to receive at their toll-houses on their road, "for a coach, chariot, or phaeton, thirty-three cents;" "mail-stage, six cents;" that during the time for which the plaintiffs claimed tolls at the rate of thirty-three cents a passage for the passage of a daily coach run by the defendants upon their road, which was a post-road, said coach gratuitously carried a daily mail over it from Providence to North Scituate, under a verbal arrangement, entered into in October, 1855, between Welcome B. Sayles, postmaster at Providence and a special post-office agent, and the defendants, for the convenience, as was alleged, of the people of North Scituate; that, in pursuance of this arrangement, mails were daily made up, forwarded from, and received at, the post-office at Providence, by the coach of the defendants, and that this service was performed by them until the next regular lettings of the contracts for the carriage of the mails in July, 1857, the arrangement being intermediate between these lettings, and those which regularly took place four years before; that at the time when this arrangement was made, and during its whole continuance, there was a regular contract for the carriage of the mail from Providence to North Killingly, passing through North Scituate, between the post-office department and one Richards, at specified hours, the purpose of the new arrangement with the defendants being to have a daily mail at different hours, so that the people of North Scituate could daily write to the city in the morning and receive an

answer at night ; that the arrangement between the agent of the post-office and the defendants was for no definite time, but at the will of the post-office department and the defendants. Some notice to give it up, but what did not appear, was required, and the arrangement certainly was not to extend beyond the next regular lettings ; such temporary and intermediate contracts being frequently made, as sworn by Mr. Sayles, the agent, by the post-office agents, he himself having made them several times ; that on the 25th day of April, 1856, upon some objection made by Richards, the regular contractor for the carriage of the mail upon the route, written notice was given by Sayles to the post-office department of the arrangement which he had made with the defendants, and the question of the continuance of this voluntary mail was submitted by him to the decision of the department, and on the 5th day of May, 1856, he received a reply from the contract office of the department, in which it was stated, in substance, that as they could not see how under the circumstances the contractor could be injured by the arrangement, they therefore could see no good reason why he should object to the citizens of North Scituate being accommodated with a mail at hours when he was not by his contract obliged to run his stages. Evidence was submitted, on one side, to show that the purpose of the arrangement was merely to enable the defendants to avoid the rate of tolls proper to their coach by making the coach, colorably, a mail-coach, and on the other, that its purpose was to give proper mail facilities to the people of North Scituate.

Upon this state of facts the plaintiffs requested the court to charge the jury, that under the post-office laws, Sayles, as a deputy-postmaster, or special agent, had no power to make a contract for carrying the mail ; and if he had, could make such a contract as was set up only in writing ; and that the act incorporating the plaintiffs, could not be construed to apply to the stages of the defendants, as mail-stages, where a contractor passed over the same route carrying the mail under a regular contract, if they had made an agreement to carry a mail without compensation from government, or otherwise, with the intent and for the purpose of saving tolls upon the turnpike road of

the defendants. The court refused, however, to instruct the jury as requested, but did, in substance, instruct them, that although Sayles, as deputy-postmaster at Providence, had no power to make the contract or arrangement in question, yet if in that capacity, or in any other, he did make it with the defendants in good faith for the mail accommodation of the people of North Scituate, and not solely for the purpose of enabling the coaches of the defendants to pass over the plaintiffs' road at a lower toll, and such arrangement was made known to the postmaster-general, and was by him ratified and approved, it made the coaches of the defendants, carrying the mail under such arrangement, mail-stages within the meaning of the charter of the plaintiffs, and liable to pay for each passage only six cents as toll; that there was no necessity for the said contract, or arrangement being reduced to writing; and further, that if the jury believed from the evidence that Sayles, as special post-office agent, made the arrangement in good faith, as aforesaid, and the same was made known to, and approved by, the post-office department, or the mail being carried by the defendants to the knowledge of the department, no objection was made to the same, the contract or arrangement was a valid contract; and if the mail was carried by the defendants under it, in the defendants' stage, it made the same a mail-stage; that the whole matter of the carriage of the mails over post-routes being confided by law to the discretion of the postmaster-general, his discretion could be inquired into collaterally only in case of want of power in him to make the contract, or fraud practised upon him in procuring it; But if the jury were satisfied that fraud was practised upon him in procuring the contract, they would be justified in finding against it; otherwise it was a valid contract, and made the stage of the defendants a mail-stage, and as such entitled to the partial exemption from toll provided by the plaintiffs' charter.

Under these instructions, it being agreed that the defendants had tendered to the plaintiffs, and the plaintiffs had received all that was due if the plaintiffs were entitled only to the lower rate of toll due to a mail-stage, the jury returned a verdict for the defendants; whereupon the defendants excepted to the

above instructions as erroneous in matter of law, and brought their exceptions to this court for the correction of the errors therein.

T. C. Greene & R. W. Greene, for the plaintiffs.

1. Welcome B. Sayles, neither as postmaster of the city of Providence, nor as a special agent of the post-office department, had power to make a valid contract with the defendants for the transportation of the mail. Mail contracts are made by the postmaster-general; but any supposed ratification by the postmaster-general of the contract made between Sayles and the defendants, cannot make said contract a valid one, for there is no power vested in the postmaster-general himself, either to make or to ratify a contract, of the character and description of the one set up by defendants. See 5 Stats. at Large, 85, § 23; Brightly's Dig. 776, § 117, to show what temporary contracts the postmaster-general may make. See also Brightly's Dig. 776, § 113. Sections relating to special agents are in Brightly's Dig. 761, §§ 19-21.

2. The charter of the company contemplates a fair and reasonable use of their road for the transportation of the mail, but the provisions of the charter should not be construed to apply to stages running under contracts of the kind set up by the defendants. Opinion of *Taney*, C. J., in *Searight v. Stokes et al.* 3 How. 171,

Browne, for the defendants.

The question in this case is, whether the defendants' stage was a mail-stage. The route was a post-route. 9 U. S. Stats. at Large, 188; 10 Ib. 364. The postmaster-general is authorized to provide for the carriage of the mail on post-roads. 4 U. S. Stats. at Large, 101, (Act of March 3, 1825); 5 Ib. 586; 6 Peters, 691, 729. Post-Office Regulations and Laws of 1857, p. 1, ch. 1, § 1. Also, § 9, p. 4. A deputy-postmaster has power between regular lettings to make temporary contracts without advertising. Section 42, page 9, Laws and Regulations of Post-Office. This need not be authorized beforehand, but may be ratified. The postmaster-general must, of course, use agents, and hence, has *ex necessitate rei* power to appoint them. 2 Brock. 280. The defendants are mail-carriers in fact and in law. 4 U. S.

Stats. 107, § 21; *United States v. Belew*, 2 Brock. 280. The fact that the carrier is not sworn, does not vitiate the proceedings. 4 U. S. Stats. 102. The decision of the post-office department is conclusive on this point. *United States v. Arredondo & others*, 6 Peters, 691.

AMES, C. J. It cannot be pretended that this arrangement, made between the deputy-postmaster at Providence and the defendants, for the carriage of the mail in their coaches from Providence to North Scituate and back, without compensation, conformed, in the manner of making it, to the directions given in the acts of congress for the making of regular contracts for the carriage of the mails. The arrangement professed to be temporary only, — determinable upon reasonable notice at the will of either party, — and, providing for no compensation, can scarcely be deemed to come within the spirit of those directions as to advertising for proposals which were prescribed by congress to avoid favoritism in the letting of mail contracts, and to ensure economy in this branch of the public service. The postmaster-general, who is expressly authorized to provide for the carriage of the mails, undoubtedly has, and from the very nature of the case must have, power to make temporary arrangements for this service in the intervals of the regular or permanent lettings. Indeed, the proviso at the end of the 23d section of the act of July 2, 1836, (5 U. S. Stats. at Large, 86,) expressly saves this power of the postmaster-general until a regular letting can take place. The numerous accidents to which this service is exposed, — the numerous unforeseen changes in it, — and the regularity with which the public convenience, not to say, necessity, requires it to be performed, not only demands such a power in the postmaster-general, but the exercise of it through a general authority communicated to his deputies and agents, subject always, for the continuance of the arrangement, to his approval. The field of the service is so extensive, that it is impossible that special authority should be communicated in every instance from the department at Washington, in season to meet every emergency. The case before us does not, however, in our judgment, require us to decide whether the sections of the act of March 3, 1825, and of July 2, 1836,

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relating to advertisements for proposals, are merely directory to the postmaster-general, or are absolutely necessary to be observed by him in order to the validity of a mail contract; or, whether, if thus necessary, a temporary arrangement to carry the mail without compensation, like that before us, comes within the spirit of those sections. Some latitude must undoubtedly be allowed in the practical working of so great a machine as the post-office department; and would undoubtedly be allowed by congress in the exercise of its control over the department through the power of appropriation. How much latitude would or should be allowed in this respect by the courts, before whom such contracts can, in general, only collaterally come, we have no guide, and prefer, if we can, to leave to those courts whose construction of acts of congress carries with it the weight of authority.

In the sense of the act incorporating the plaintiffs as a turnpike company, that, in our view, is a mail-stage which, with the allowance of the post-office department, carries the public mail over their road for the public convenience, and not merely as a fraudulent contrivance between the department or its subordinates, and the mail carrier, for the purpose of evading the prescribed rate of tolls. So that the contract be fairly made for the public good and the mail be carried over their road, it is no concern of the plaintiffs whether there be a place in the contract, under the acts of congress, which will enable either party to escape from its obligation. The purpose of the exemption was, to encourage and invite mail service upon the road for the mutual benefit of the company and of our citizens; and this is equally answered, whether the mail contract in all respects conforms to the acts of congress, or not. Such, in common parlance, is the meaning of the term, "mail stage;" and we have no reason to suppose that the general assembly, in granting this charter, or the company in accepting it, understood the phrase in any other than its common sense. Tolls are demandable upon the spot for each passage of a vehicle; and some palpable test of the rate to be demanded would seem to be far more appropriate than one depending upon legal refinements, applied to the validity of mail contracts, and upon the power of the

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postmaster-general and his deputies and agents to make them, under long and involved acts of congress.

It is evident, from the proof reported in the bill of exceptions, that when this arrangement was, upon the objection of the regular mail contractor upon this route, reported by the deputy-postmaster who made it to the contract office of the department, it was approved, and its continuance permitted; and the jury who tried this cause must have found, looking at the instructions given to them, that it was so made, and that too, not for the mere purpose of enabling the defendants to evade a higher rate of toll upon the plaintiffs' road, but because required for the public convenience.

Without minutely going into the instructions given to the jury in the court below, in the view we have taken of the toll-rate clause of their charter, the plaintiffs have no cause to complain of these instructions, and we, therefore, overrule their exceptions to them.

JAMES CRANSTON v. ROBERT T. SMITH.

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21	86

A bill in equity is not demurrable, because, in stating a trust charged upon lands or an agreement which comes within the scope of the statute of frauds, it does not disclose whether the trust or agreement is provable by proper written evidence or not; the proper course being to take such objection by plea or answer.

DEMURRER to a bill in equity. The bill stated that the complainant — deformed and crippled in body from his birth, and incapable of earning his own livelihood — was the illegitimate son of Ebenezer Smith, late of Barrington, deceased, father of the defendant, and during the life of said Ebenezer, always lived with him, and was acknowledged by him and his family, including the defendant, as such illegitimate son; that on or about the 15th day of January, 1854, the said Ebenezer Smith died, intestate, seised and possessed in his own right in fee simple, of certain real estate, viz.: a farm situated in Barrington, being the farm upon which the said Ebenezer formerly

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resided and upon which the defendant now resides, and leaving a widow and six legitimate children, one of whom is the defendant, and an illegitimate son, the complainant; that upon the death of said Ebenezer the defendant entered into possession of said farm, and that the complainant, for about three years thereafter boarded with the defendant thereon, at the expiration of which time, to wit, on the 3d day of January, 1857, the heirs at law of said Ebenezer agreed among themselves upon a division of said real estate, and divided the same as follows, viz.: the whole of said farm was valued, by agreement, at the sum of eight thousand dollars; and after settling with the widow for her right of dower therein, the balance was divided into seven shares, and one of said shares set off to each of said six heirs who allowed and set apart the other remaining share, amounting to one thousand dollars, to the complainant; and said other five heirs then conveyed their entire interest in the whole of said farm to the defendant, he paying them therefor one thousand dollars less than the agreed value of their combined interests therein, and they leaving and placing in his hands the other one thousand dollars, the share allowed and set apart for the complainant, or, rather, they conveying to the defendant, in fee simple, an interest and share in said farm, equal in value to one thousand dollars, without any payment by him therefor, but the defendant, in consideration thereof, then and there agreeing to support and maintain the complainant in a comfortable manner, furnishing him with good and proper food, shelter, and clothing, and taking good care of him during his natural life; and that, accordingly, the complainant, from that time down to the time when, on the 17th day of April, 1858, as hereinafter stated, he was compelled to leave the defendant, remained with him upon said farm; that ever since the division of their said father's estate as aforesaid, the defendant has treated the complainant in a most cruel and inhuman manner, — many times allowing him only refuse food, unfit for any human being, — not providing him with sufficient clothing, nor, in cold weather, with sufficient fire to protect him from the weather and to keep him comfortably warm, and, even in severe winter weather, compelling him to occupy and sleep in an outbuilding,

without fire, and with no other bed than a straw bed, and an old comforter to cover him, and frequently using violence and cruelly beating the complainant without provocation or cause; that the complainant bore such treatment as long as he was able, and longer than he would or could have borne the same, had it not been for his utterly helpless and dependent condition, well hoping that the remonstrances of friends and neighbors who, through pity, interested themselves in his behalf, would induce the defendant to mitigate his treatment and ameliorate his condition; but that, finding all remonstrances in vain, the complainant, in self-defence and for self-preservation, was at length compelled, in order to escape such inhuman treatment, to run away from the defendant, which he did, on the 17th day of April, 1858, and has since resided, and now resides, with the overseer of the poor of the town of Barrington.

The bill then goes on to pray that the defendant may answer the premises, "and that the defendant may be compelled, by decree of this court, comfortably and properly to support, maintain, and clothe your orator during his natural life, and that the said defendant may be decreed to be the trustee of your orator for said sum of one thousand dollars and interest thereon from said second day of March, 1857, the date of said settlement, — and may be decreed to pay over the same to your orator, or to such proper person as your honors may appoint, to receive and hold the same as trustee for your orator, and that the same, until paid, may be decreed to be a lien in favor of your orator upon the real and personal estate of the respondent, and that in default of such payment by the respondent, such his estate, or so much thereof as may be necessary, may be sold to pay the same, and that in the mean time said respondent may be enjoined from selling, conveying, or incumbering such his estate," and for further relief. To this bill, which was originally filed in the county of Bristol, and removed, by agreement, to the county of Providence, the defendant filed a demurrer for want of jurisdiction and want of equity.

The case was submitted, without argument, by *James Tillinghast*, for the complainant, and *Payne & R. W. Greene*, for the defendant.

AMES, C. J. The bill states a gross breach of trust committed by the defendant to the injury of one whose helpless condition strongly appeals for him to the protection of the court; and as it has been submitted to us, upon demurrer, without argument, we are at a loss to conceive upon what ground the demurrer has been filed. If, indeed, as is substantially alleged, the defendant has received from the brothers and sisters of the deformed and crippled complainant a conveyance of real estate charged with the duty of comfortably supporting him, a court of equity would be quite regardless of its jurisdiction and of the obligations which it imposes, if it did not endeavor to remedy a fraudulent evasion of such a duty.

The only supposable ground of this demurrer is, that, as it does not appear on the face of the bill whether the trust or agreement of the defendant is in writing or not, the bill is deemed, on that account, to state a case within the inhibition of the statute of frauds. This statute, however, has always been held, at law, to have introduced a new rule of evidence merely, and not to have altered or affected the manner of pleading; 1 Saund. 9 a. (n. 1), 276, (n. 1); and we do not see, upon principle, how any different construction can be put upon it in a court of equity. Upon this ground, it was decided in *Cozine v. Graham*, 2 Paige Ch. R. 177, that where it did not appear upon the face of the bill, whether an agreement, within the scope of the statute of frauds, was in writing or not, if it was a good agreement by parol at the common law, it could not be objected upon demurrer, that it was not stated in the bill to be in writing; the agreement, if in writing, being, in this manner, well stated in the bill. Although some dicta may be found in the books, as noticed by Chancellor Walworth, in *Cozine v. Graham*, supra, which appear to warrant a demurrer in such a case, the practice has always been otherwise, and the objection has always been taken by plea or answer, as, upon principle, it ought to be.

It is unnecessary for us, therefore, for the purpose of disposing of this demurrer to consider whether we have any enactment upon our statute book tantamount to the 7th section of the statute of 29 Chas. 2, ch. 3, avoiding parol trusts of lands; and,

Second Universalist Society in Providence v. The City of Providence.

if we have, whether this bill states facts which enable the court, notwithstanding, to give relief, in order to prevent fraud.

For the reason above given, we are not satisfied that no discovery or proof, called for by the bill, or founded upon its allegations, can make the cause set forth in it a proper subject of equitable cognizance, and must, therefore, overrule this demurrer to it, with costs.

SECOND UNIVERSALIST SOCIETY IN PROVIDENCE v. THE CITY OF PROVIDENCE.

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8	482
11	382
6	236
19	502

The interest of a religious society in lands leased by them, and upon which they have erected a building, partly occupied by them for religious worship, and partly rented for stores and other purposes — the rents and profits being appropriated exclusively to religious uses, — is exempted from general taxation by § 2, ch. 37, of the Rev. Stats.; but not from an assessment made upon it for benefits derived from the laying out of a new street, in the vicinity, under the act of January, 1854, entitled "An Act in relation to the laying out, enlarging, straightening, and otherwise altering streets in the city of Providence."

Where a religious society held lands under leases which covenanted that the society should pay all taxes assessed upon the demised premises, and, at the request of the treasurer of the society, the lands, for their interest in which the lessors had before been taxed, were, for the convenience of the society in paying such tax, assessed solely to the society: *Held*, upon an action brought by the society to recover back such tax as illegally assessed, — the same having been paid under protest, — that the society were equitably estopped from objecting to the change of assessment.

Where a lessee voluntarily pays a city street-assessment, duly made against the lessors for their reversionary interest in the demised premises, it cannot be recovered back from the city, although there was no obligation upon the lessee to pay it under the covenants of the lease.

ASSUMPSIT to recover of the city of Providence the sum of \$478.50, paid by the plaintiffs under protest, for taxes, as they claimed, illegally assessed against them by the city, which sum included also the sum of \$30.33, paid by them for benefits from the laying out of Dorrance Street assessed against Benjamin Barker and Catharine, his wife, lessors of the plaintiffs.

The case was submitted to the court in fact and law; and at the trial it appeared, that the plaintiffs, a religious society, were, at the January session of the General Assembly, 1848, incorpo-

rated by the name of the "Second Universalist Society in Providence;" that the society in 1848, became lessees of three several lots of land which lay in a body at the west corner of Broad and Eddy Streets in Providence, extending back to Middle Street,—each of their said leases being for ten years, and renewable, upon an appraisement of rent every five years thereafter, during the term of one hundred years, and each containing, amongst other things, a covenant on the part of the society, that they would "pay all taxes and assessments of every kind, that should be assessed upon, or payable from, the leased premises, during the continuance of the lease, or of any renewal thereof;" that upon these lots the society had built a three story brick building, with a front of eighty feet on Broad Street, and extending along Eddy to Middle Street; that with the exception of a space in the building of forty by eighty feet, and a vestry of forty feet square, which were used for religious worship, the building, including the basement, was rented by the society to various tenants for stores and other purposes at an annual rent in all, in 1857, of between \$2300 and \$2400; that the whole of the rents thus received were applied by the society to the support of public worship in their said building, and were insufficient therefor,—the balance being derived from pew taxes which the society were empowered to assess by virtue of an amendment to their charter, procured at the January session of the general assembly, 1852; that prior to the year 1856, the three lots, holden by the society under the leases aforesaid, had been solely assessed to the lessors,—being lots 147, 148, and 160 on plat No. 20, of the plats of the assessors of taxes in Providence,—but in that year the treasurer of the society came to the office of the board of assessors, and requested the chairman of the board, that, as the society were liable for these taxes under their leases, they might in future, so that the society might avail themselves of the customary three per cent. deduction for prompt payment, be assessed to the society; that the chairman, hesitating about granting the request, told the treasurer of the society that if he would make the request in writing he would lay it before the board for their decision, and, accordingly, the following written request was handed by the treasurer

of the society to the chairman of the board of assessors, and was by him placed on the files of the board.

" To the Board of Assessors of the City of Providence.

" Gentlemen, — You are hereby requested to tax the following lots, viz. : — Plat 20, lot 147, now taxed to Benjamin Barker and wife, Tiverton ; lot 148, now taxed to Thomas Mathewson, Providence ; lot 160, now taxed to Harriet Mathewson, Providence, to the Second Universalist Society in Providence, and I will hold myself responsible for all taxes that may be legally assessed against the same.

" DANIEL ANGELL, *Treas. of the Second Universalist Soc.*
" Providence, July 14, 1856."

Upon this request the three lots were assessed in the year 1856, to the lessees, the society, instead of to the lessors, as before, and the taxes upon them for that year were paid by the society. In the year, 1857, the general city tax, amounting to \$288.60, was assessed upon these lots to the society — together with the sum of \$125 for benefits derived by the society as lessees from the laying out of Dorrance Street, in the vicinity, under the act of January, 1854, entitled " An Act in relation to the laying out, enlarging, straightening, and otherwise altering streets in the city of Providence." These two sums, together with the sum of \$34.57, for expenses incurred in advertising and notifying parties interested in the lots, amounting in all to the sum of \$448.17, — were, on the 26th day of February, 1859, paid by the society under protest. On the 10th day of December, 1858, the society also paid to the collector of the city, the sum of \$30.33 ; being the sum assessed with interest against Benjamin Barker and Catharine, his wife, lessors of one of the lots holden by the society, for benefits derived by them to their reversion, from the laying out of Dorrance Street.

It was in proof, that the annual rent received by the society from their building had increased since 1857, between three and four hundred dollars. It also appeared, that when the collector of Providence advertised the lots of the plaintiff for sale for nonpayment of the taxes assessed upon them in 1857, he ad-

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vertised for sale, the right, title, and interest of the Second Universalist Society, alone, in said lots.

To recover the above taxes paid by the society to the city of Providence, for 1857, with interest from the time of payment, this action was brought, upon the ground that the same were illegally assessed, and the payment thereof extorted by force of the collector's warrant.

Payne, for the plaintiffs, relied upon the exemption from taxation, found in ch. 37, §§ 1, 2, of the Rev. Stats, of "houses for religious worship," "and the land used in connection therewith so far as the same is held, occupied, and used for, and the rents and profits thereof are applied to, religious" purposes.

He called attention to the advertisement of the collector as shewing that the interest of the society, and not of their lessors, was what was taxed in 1857, and was to be sold for non-payment of the taxes assessed on the lots in that year.

He denied that the society were equitably estopped by the request of their treasurer in 1856, that the lots should be assessed to them instead of their lessors, from contesting the tax of 1857. The request was made without authority from the society, to a board of annual election, and with regard to taxes assessed under the law, as it existed in 1856, and before the revision of 1857. It did not profess to bind the society, but proffered only the personal responsibility of the treasurer for the payment of the taxes, if they should be assessed against the society, instead of against their lessors.

Clarke, city solicitor.

That portion of the plaintiffs' building, which was appropriated to other than religious purposes, is not exempted from taxation; and as the plaintiffs have handed in no list of their ratable property, if any portion of their property is ratable, they cannot recover in this action the amount in which they are over-taxed. Besides, as the lots were taxable to their lessors, and the assessment of them to the society was procured by their treasurer solely for their convenience, the society is equitably estopped from contesting the tax.

The general tax act has no relation in its exemptions to taxes assessed for benefits derived to adjacent owners from

the laying out of new streets or altering of old ones, under the special act of 1854 upon that subject, applicable only to the city of Providence. But if it had, so far as the \$30.33 assessed for benefits from the laying out of Dorrance Street, upon the society's lessors, Barker and wife, is concerned, the plaintiffs voluntarily paid that amount for their landlords, and cannot recover it back from the city.

[Mr. Justice *Brayton* suggested, that as this tax was a lien upon the lots, and they were described in the assessment by their numbers on plat No. 20, of the assessors of Providence, so that they can be identified, the tax might still be collected out of the lots, as within the equity of the ninth section of chapter thirty-eight of the Rev. Stats. which provides for such collection out of real estate assessed by mistake to a person not the owner.]

Payne, for the plaintiffs, replied, that by the collector's advertisement of sale, it appeared that it was the interest of the *lessees* which had been taxed, and not of the lessors, since the former only was advertised for sale for the payment of the same.

Clarke, for the city, answered, that the lots for which the assessment was made were accurately described by reference to the assessor's plat, and were assessable by law to the owners, the lessors; and although, if the collector had sold the plaintiffs' interest in them for the tax, the sale might have been avoided, his mistake did not tend to prove that only the interest of the lessees had been assessed, the contrary of which had been proved by the chairman of the board of assessors.

AMES, C. J. The interest of the plaintiffs in these lots was undoubtedly exempted from the general tax of the city of Providence, in 1857, by force of sect. 2, ch. 37, of the Revised Statutes, as an interest in a house of religious worship and in land connected therewith, the rents and profits of which were applied to religious uses. In fact, the evidence shows, that the city of Providence never attempted to tax it; but prior to 1856, assessed their tax for these lots, occupied by the plaintiffs, to their landlords alone, and, as it must be presumed, in proportion to and for their valuable rent-paying interest in the same.

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In that year, for the convenience of the plaintiffs, who were liable under their leases to pay the taxes upon these lots, and at the request of their treasurer, the assessment was changed from their landlords to the plaintiffs; and no notice having been given to the assessors that the motive which influenced the request had ceased to operate, the assessment for the lots was again made to the plaintiffs in 1857.

If, after this, the society should be permitted to evade payment of this tax upon the ground that it should have been assessed against its lessors, it would be permitted to commit a fraud; and we do not think that religious societies should be allowed to commit frauds, even for the sake of evading taxes.

It was answered to this view of the case, that the treasurer of the society had no authority, by virtue of his office, or communicated to him by the board of trustees, to invite such a change, and that the assessors had no authority to make it; and that as the request was made to a board of annual election, it should be construed to apply only to the current year, especially as since the request was made the tax-act has been amended. As to the first branch of this reply, the proof is, that the treasurer, who was also a trustee, paid the tax for 1856, for which he had procured the change of assessment. By the third section of article third of the by-laws of the society, the treasurer is to pay out the money of the society as directed by a vote of the board of trustees, unless otherwise ordered by a vote of the society. The matter stands then in this predicament: that the treasurer either has a general power to pay the debts of the society, subject to the direction of the board or of the society, — which would carry with it a power to arrange previously for the most economical mode of payment, which was all that was effected by this change, — or, that the above by-law forbids him to make any payment without a vote of the board of trustees or of the society. Now the tax of 1856, the change of assessment of which he had procured, was, in fact, paid by him, and as we must presume, in the absence of proof to the contrary, with the sanction of the trustees, which would be tantamount to a sanction of the change of assessment. As to the absence of right in the assessors, upon such a request, to make the

change, we apprehend that it has nothing to do with the question. The change was in fact procured by the treasurer of the society from the assessors; and whether the latter ought to have complied with the request of the former or not, the city ought not to be deprived of any portion of its tax by such practices upon the officers appointed by law to assess it. The board was a standing one, though its members were of annual election. The assessment requested to be changed was of the landlord's tax, which the alteration of the law did not affect, and could not have been supposed to affect; and the request, which was required to be in writing, was placed upon the files of the board, and, as the proof is, did actually induce the board, as it well might, there being no notice to the contrary, to make the assessment in 1857, as they had done, upon the same request, in 1856. The change of assessment thus procured was injurious to no one, was convenient to, and caused by the plaintiffs; and we should be doing serious injury to the cause of public morals if we did not hold them estopped from objecting to it until in some form the request had been withdrawn.

The assessments paid by the plaintiffs for benefits from the laying out of Dorrance Street, and which are sought to be recovered in this action, fall under a different consideration. They were not collected by virtue of the general tax-act, nor are the plaintiffs privileged from them by its exemptions. Such assessments represent, on the theory of the special act which authorizes them, values received from a public improvement, by the estates assessed for it; and there is no reason why a *religious* society should not pay the just price of a special value thus conferred upon its property, as well as any other society or individual. We are happy to learn from the evidence, that in compensation for this assessment of \$125, made in 1857, the annual rents of the plaintiffs have, since that time, increased, and probably from the laying out of Dorrance Street, some three or four hundred dollars.

These remarks apply to the assessment for this improvement laid upon the leasehold interest of the plaintiffs. As to the assessment of \$30.33, made upon the reversionary interest of Benjamin Barker and Catharine his wife in one of the lots

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leased to the plaintiffs, and which they seem to have paid, there is still less ground for their recovering it. For aught that appears, it was properly assessed to Barker and wife, and was not claimed by the city, through their collector, of the plaintiffs. The plaintiffs were under no obligation, it is true, to pay it under their covenant to pay taxes contained in their lease from the Barkers, as decided by this court, at the last term, in the case of *Horace T. Love & wife v. George A. Howard*, supra, p. 116. It must be taken as a voluntary payment to the city, whose due it was, made by the plaintiffs for their landlords; and for that reason cannot be recovered back.

Judgment for the defendants for their costs.

G 242
H 342

**RICHARD W. GREENE v. MARINUS W. GARDINER, City
Treasurer.**

R. W. G., who had a double residence in the towns of W. and P. was, in December, 1856, taxed for personal property in the town of W. where he had been a tax-payer and voter for several years. On the 31st day of March, 1857, a tax-act went into operation, which provided, that persons should be taxable for their personal estate in the towns in which they had their actual abode for the greater portion of the twelve months next preceding the first day of April in each year. *Held*, that R. W. G. having had his actual abode in the town of P. for more than six months next before the first day of April, 1857, was, in the September of that year, taxable for his personal property, in the town of P.; and that the tax act was not made to retroact, by taking into account R. W. G.'s place of actual abode prior to its going into operation, in order to ascertain his place of taxation under it, after it went into operation.

ASSUMPSIT to recover the sum of \$767.25, with interest from the 9th day of February, 1859, for taxes on personal property to that amount, claimed by the plaintiff to have been illegally assessed against him in the year 1857, and paid by him under protest.

Upon the trial of the case, under the general issue, before the court, to whom the same was submitted both in law and fact, it was admitted, that in December, 1856, the plaintiff was domiciled in the town of Warwick, where he had a farm and coun-

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try residence; and though he had a town-house in Providence and lived there during the winter and spring months, that for several years previous he had been a tax-payer and voter in Warwick; that in December, 1856, the plaintiff was assessed in that town upon his personal estate as an inhabitant thereof, and paid said tax on the February following, his receipt from the collector of Warwick stating that he had paid the tax for the fiscal year 1857; that the practice in Warwick had for a number of years been, to order, in November, an annual tax for general purposes to be assessed in December, and that this practice was pursued in the years 1856 and 1857; that the practice in Providence had long been, to order, in May, an annual tax to be assessed in September; that the plaintiff had his actual abode in Providence for more than six months next preceding the first day of April, 1857, and was in that year taxed for his personal property in Providence, and not in Warwick; and this tax was the one which was paid by the plaintiff under protest, and sought to be recovered in this action.

T. C. Greene, with whom was *R. W. Greene*, for plaintiff.

The tax-act of January session, 1857, which went into effect on the 31st day of March, 1857, introduced a new rule as to the place of taxation for personal property of persons having a double residence; substituting for domicile, according to the election of the resident, the test of actual residence for the majority of the twelve months next preceding the 1st day of April, in each year. At the time when the law went into operation the plaintiff was a tax-payer in Warwick, and in December, 1856, had paid to that town a tax on his personal property for the fiscal year 1857. To allow Providence to tax the plaintiff in September, 1857, because he had resided in that town for the major part of the twelve months next preceding the 1st day of April, 1856, all of which occurred prior to the statute's going into operation, would be to make the statute retroact to the deprivation of Warwick of a tax due to her, as well as to the injury of the plaintiff. There cannot be two co-existent rights in different towns to tax the same person for personal property at the same time. The language of the act indicates that the residence must precede the right to tax; and to make the plain-

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tiff taxable in Providence in 1857, you must go back into the year 1856, when he was taxable in Warwick, and in fact taxed there for the fiscal year 1857.

Clarke, city solicitor.

The different towns of the state have a right to tax for legitimate purposes as often as they will. Ordinarily, it is true, they impose their general taxes but once a year: in Providence, to give more time to collect the tax, earlier, in September, and in the smaller town of Warwick, later, in December. If the tax of Warwick, in 1856, was, as contended, for the fiscal year 1857, so was the tax of Providence for that year; and when the plaintiff was taxed in Providence in 1857, in which year it is agreed that he was not taxed in Warwick, upon his own construction, it was for the fiscal year 1858, which is perfectly consistent with his having been taxed by Warwick in 1856, for the fiscal year 1857. The truth is, that in legal contemplation, as well as in fact, each town taxes not for future, but current, expenses, when it pleases, and as much as it pleases. The act of 1857, which established the status of tax-payers under it, does not retroact, but merely determines the place of future taxation of persons having a double residence, by the test where, before a certain period in the year the tax is laid, they have enjoyed the greatest share of municipal benefits and protection. The great practical objection to allowing the plaintiff to recover in this action is, that if Providence does not retain this tax for his personal estate in the year 1857, as he was not taxed for it in Warwick in that year, he will be, to that extent, deprived of the pleasure of contributing to the public burdens.

AMES, C. J. The evil designed to be remedied by the clause of the tax-act of 1857, upon which this case turns, is well understood. Persons having a double residence, in town and country, would not unfrequently select the latter as their domicile, though they spent only the summer months there, for the purpose of escaping, so far as their personal property was concerned, the higher rate of town taxation, whilst they enjoyed, during the greater portion of the year in town, all the comforts and conveniences secured by it. Instead, therefore, of the old rule, the act of 1857, which went into effect on the 31st day of March

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of that year, provided, that "all ratable personal property shall be taxed in the town where the owner shall have had his actual place of abode for the larger portion of the twelve months next preceding the 1st day of April in each year." Rev. Stats. ch. 38, § 10.

Under this provision, the plaintiff, who had theretofore been taxed in the town of Warwick, where he had a country-place, was in September, 1857, assessed upon his personal property in the city of Providence, — the place of his actual abode for the larger portion of the twelve months next preceding the 1st day of April in that year; and, having paid the tax under protest, now seeks to recover it back from the city in this action. The ground of recovery set up by him is, that being a tax-payer in Warwick when this act went into operation, and having paid a tax rightfully assessed against him in that town in December, 1856, as he claims, for the year 1857, to allow him to be taxed in another town during the term elapsing between December, 1856, and December, 1857, and on the ground of an actual abode in Providence prior to the time when the act of 1857 went into operation, would make the law of 1857 retroact to his injury, and to the injury of the town of Warwick. As it is admitted that he was not taxed in Warwick in December, 1857, the injury to Warwick from allowing Providence to retain the tax collected of the plaintiff for that year, is not so obvious as the benefit which the plaintiff will derive from one year's immunity from taxation on his personal estate, if he can compel Providence to refund the amount of this tax.

Without, however, looking at the practical consequences, in his own favor, of the ground taken by the plaintiff, we are all satisfied that it cannot be maintained. The towns may, for the purposes allowed by law, tax property ratable by them when, and as often, as they will; and although they usually tax for general purposes but once a year, it is not exclusively for the expenses of the future year, but for the expenses of the current year, incurred and to be incurred. We have no evidence that the custom of Warwick in this respect differs from that of Providence; although the larger town assesses its annual tax earlier in the year than the smaller, in order that it may have,

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as is necessary, more time to collect it, and thus be able to meet as promptly its annual expenses.

The plain truth is, that the plaintiff sets up the fact that he paid, under the law as it then stood, a tax on his personal estate, in Warwick, in 1856, as a reason why he should not pay, under the law as it now stands, a tax upon his personal estate in Providence, in the year 1857, where alone for that year he has been taxed. This is no case of double taxation, since it is for different years; and the plaintiff's real cause for complaint is reduced to this, that he is assessed earlier by three months in the year 1857, in Providence, than he was in the year 1856, in Warwick. We have no control over the discretion of either town in this respect, and if we had, we see no reason to doubt that both have exercised it in the way most beneficial to each.

Nor do we see how, in any offensive sense, the new provision of the act of 1857 is made to retroact, if in ascertaining where the plaintiff is taxable for personal estate under it, regard is had to what was his place of actual abode prior to the passage of the act. To cure an existing evil, the act was designed to affect the rights of the towns to tax persons having a double residence; and can in no proper sense be said to retroact, because it looks to past events or facts to ascertain the place of *future* taxation. As well, for the same reason, might it have been said to retroact, if it had provided that for the future persons should be taxed for their personal estate in the towns in which they had been born, or been married, or in which they had lived ten years, if born, married, or so long living, in any town within the state. The act simply declares to the plaintiff and others who have the advantage of a double residence, "*You have been* taxed for your personal property in the town which you selected out of the two in which you lived; but you *shall be* taxed in that in which you have lived a major part of the twelve months next preceding the 1st day of April in each year."

In fine, we see no reason why the plaintiff should not have been taxed, in the year 1857, for his considerable personal estate, in the only town in which he has been taxed, or, under the law, could have been taxed, in that year; and, accordingly, order

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judgment to be rendered in this suit for the city treasurer of Providence, for his costs.

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20	156

THANKFUL WEBSTER V. WELLS BAGGS.

Under the statutes of Rhode Island, which authorize and require the executor or administrator of a deceased party to a pending action at law, wherein the cause of action survives, to appear and further prosecute or defend the action, and also define the entry of a suit in court to be, the filing of the necessary papers in the case with the clerk and the payment to him of the entry fee on the first or second day of the term, a plea in abatement of an action, the declaration in which, following the writ, is in the name of a deceased plaintiff, "that, after the service of the writ, and before the filing and entering of the action in court, the plaintiff died, and an administrator was appointed and qualified to act for her estate," is bad upon demurrer; inasmuch, as it is consistent with the supposition, that the plaintiff may have died after the filing of the declaration, which then would properly be in her name, and before the entry of the action in court.

ASSUMPSIT upon twenty-two promissory notes, amounting, in all, to upwards of a thousand dollars, and made by the defendant payable to Thankful Webster.

Plea in abatement, "that the said Thankful Webster, at whose suit the said action is above supposed to be prosecuted against the said defendant, after the purchase and service of the said writ against the defendant, and before the time of filing and entering said action in this court, to wit, on the 30th day of January, A. D. 1859, at Providence aforesaid, did die; and that afterwards, to wit, on the 25th day of February, A. D., 1859, at Providence aforesaid, and before the time of filing and entering said action in this court, one Sprague Kenyon was lawfully appointed administrator upon the estate of the said Thankful Webster, and was, then and there, duly qualified according to law to act as such administrator; and this, &c."

General demurrer by the administrator of Thankful Webster, and joinder.

There was also filed, by Sprague Kenyon, the administrator of Thankful Webster, a motion to amend the declaration, so as, in apt words, and proper form, to set forth the fact that the suit was carried on by him in his said capacity.

Payne & Colwell, for the plaintiff.

In this case the death of the plaintiff is suggested, and a motion is filed to allow the administrator to prosecute the suit. The defendant pleads in abatement the death of the plaintiff, and the appointment of an administrator before the action was entered in court, to which plea the plaintiff demurs, and in support of the demurrer says,—

That said suit is upon promissory notes of the defendant, payable to Thankful Webster, and, therefore, the cause of action survives, and the administrator of Thankful Webster has power to prosecute said suit. Rev. Stats. 378, § 5; *Clendinin v. Allen*, 4 N. H. 385; *Moore v. Rand*, 1 Wis. 245; *Carmichael v. West Feliciana Railroad Co.* 2 How. (Miss.) 817.

Ashley, with whom was *Brownell*, for the defendant.

1. The plea sets forth the death of plaintiff, after service of writ and before the time for entering the action in court. By such death, the action, at common law, is abated. Gould's Pleading, p. 264, ch. 5, § 90; *Hatch v. Eustis*, 1 Gall. 162; *Greene v. Watkins*, 6 Wheat. R. 260, and 5 Cond. R. 87.

2. In this state, an executor or administrator, in case of the death of a party to the action or suit, and in case the cause of action survives, may prosecute or defend such action or suit from court to court. Rev. Stats. ch. 161, § 5, p. 378.

3. In order to prosecute a suit or action, a person must be a party to it, and an actor in it. An executor or administrator, then, in order to *prosecute* a suit or action, must appear upon the record as a *party*, for that purpose. *Hatch v. Eustis*, 1 Gall. 164; *Greene v. Watkins*, 6 Wheat. R. 260, and 5 Cond. R. 87, n.

4. After the death of a party to a suit, therefore, no step can be taken until the representative of the decedent has appeared as a party upon the record.

5. In this case it appears from the record, that the party plaintiff, and actor, died before declaration filed, and no one has appeared, as her representative, to prosecute the action.

6. The motion to amend ought not to be granted.

1st. The declaration is defective in substance, not in form merely.

2d. It is not such a defect in substance that the court ought to allow its amendment.

(1) The original writ was served by attachment of real estate, which was as well discharged by the failure of the administrator to prosecute, as it would have been had the intestate lived and neglected to prosecute the action.

(2) It is sought by the proposed amendment to revive an action, which has been abated by the death of the plaintiff, through the introduction of a new party.

BRAYTON, J. The question to be here determined arises upon the demurrer to the defendant's plea in abatement, and is, whether the facts alleged in that plea are sufficient to sustain the judgment which the plea asks.

The only facts alleged in the plea, and, therefore, the only facts admitted by the demurrer are, that after the commencement of this suit, and before the time when the same was filed and entered in this court, the plaintiff died, viz.: on the 30th of January, 1859; and that, afterwards, on the 25th day of February, A. D., 1859, and before the time when the action was filed and entered in court, one Sprague Kenyon was lawfully appointed administrator on the estate of the said deceased plaintiff, and was duly qualified to act as such administrator.

If the question were to be determined by the rules of the common law, the last allegation of the appointment of an administrator would have been unnecessary. It would have been quite sufficient to have alleged the death of the plaintiff. By his death alone (though the right of action survived) the action would have become abated; and, upon the appointment of an administrator, he must have commenced a new action in his own name.

But this rule of the common law has been, in this state, modified by statute; and ch. 161, § 5, of the Revised Statutes, provides, that if, after the commencement of a suit in which the right of action survives, (as it does in this case,) and before final judgment thereon, the plaintiff or defendant shall happen to die, the executor or administrator of such deceased party shall have power to prosecute or defend any such action, and shall be obliged so to do, &c.

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This provision does not contemplate that the suit shall abate by and upon the death of the party, but that the executor or administrator, who may become qualified to act, shall carry on the suit from the point where it may have been left by the deceased party, and that the action shall only be dismissed when it shall not have been prosecuted by such executor or administrator within a reasonable time after he becomes qualified to act. The succeeding section of this chapter provides, that if such executor or administrator shall fail in his duty in this respect, and shall neglect to appear and take upon himself the prosecution or defence of the suit, he may, by order of the court in which the suit is pending, be summoned to appear for that purpose, and being so summoned, it further provides, that whether he comes in in obedience to such summons or not, judgment may be rendered in such case, in the same manner as if he had been originally a party.

It should appear, therefore, from the plea, not only that the plaintiff has departed this life since the commencement of the suit, but further, that since her death an administrator has been duly appointed and qualified, but has neglected to prosecute the suit, as it is made his duty to do. All the facts necessary to sustain the judgment prayed for in this plea, should be clearly, certainly, and directly alleged. They are not to be implied from other expressions in the plea. The plea, in our judgment, is defective and insufficient in that it does not allege a failure by the administrator to prosecute the suit after the death of the plaintiff. Notwithstanding anything alleged in the plea, this suit may have been prosecuted by the administrator who interposes the demurrer to this plea, since his appointment and qualification as such.

The plea states, that Thankful Webster, the plaintiff, died after the service of the writ, and before the action was filed and entered in court. The statute prescribes what shall be such entry in court. It is, that all the necessary papers shall first be filed with the clerk, and in addition, that the entry fee shall be paid; and it prescribes the time also when this entry is to be made, viz.: on the first or second day of the term, and afterwards, upon good cause shown, in the discretion of the court.

Bowen v. Steere, Executor.

The statute also requires, that twelve days before the sitting of the court, and so twelve days before the time for entering the action in court, the declaration in the suit shall be filed in the clerk's office. For anything contained in the plea, it may be, that Thankful Webster, the plaintiff, in her lifetime, declared against the defendant in this suit, and filed the declaration in her lifetime in the clerk's office, according to the requisitions of the law, but that she died before the payment of the fees necessary for the entry of the action in court, and that the administrator, upon his appointment, proceeded to have the said action entered in court in the due prosecution of the suit, and in the further prosecution, has here filed his demurrer to this plea. This the statute not only authorizes, but requires the administrator to do. The facts alleged in the plea, clearly, do not warrant the judgment that the plea asks, that the writ and declaration be quashed, &c., and the plea must therefore be overruled, and judgment be entered, that the defendant answer over.

CLOVIS H. BOWEN v. SMITH A. STEERE, Executor.

A party to a reference cannot object to the report, that he was surprised by a ground of defence taken at the hearing before the referees, and was unprepared to meet it by proof, if at the hearing he did not ask for delay; but by going on, notwithstanding his surprise, is deemed to have completely waived it.

A report of referees will not be set aside and a new trial before the referees ordered, on account of the discovery of new and further evidence which is cumulative only and not controlling in its character, especially when the effect will be to delay the settlement of the estate of a deceased person.

An avowal by a referee, after his appointment and before the hearing, of an opinion adverse to the claim submitted to him, is good cause not only to set aside his report, but to discharge the rule appointing him; the court requiring in referees the judicial attribute of impartiality, unless indeed the parties have agreed to waive it.

THIS was a claim of \$3,000, made by Clovis H. Bowen, a son-in-law of the late Anthony Steere, of Gloucester, against the executor of his estate, for services, during a period of nearly

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ten years, rendered to the testator in the management, sale, and disposal of his considerable real estate. The claim had been submitted, under a rule out of this court, obtained upon the joint petition of the claimant and the executor, to the arbitration of Asa Winsor, Thomas Cutler, and Martin A. Smith, as referees, who had been selected by the executor from a list of persons handed by the claimant to him for that purpose; and there was no evidence tending to show that both did not, at the time of their selection, consider them fair and impartial referees. After a hearing in the village of Chepachet, at which both parties were present, and in which the testimony of the claimant was received in support of his claim, two of the referees, Winsor and Cutler, concurred in a report awarding to the claimant the sum of \$600 in full of this whole claim. Upon the presentation of the report at this term for reception and confirmation, — motions were made by the claimant, — one, that the report be recommitted to the referees, because he was surprised at the hearing by the denial of his agency, and had discovered, since the hearing, new and further evidence in proof of it and of his services, — and the other, that the rule be discharged, on the ground that, although the referees were not corrupt, two of them, Smith and Cutler, had formed and expressed opinions adverse to his claim, after their appointment as referees, and before the hearing.

The substance of the affidavits, in support of these motions, are sufficiently stated in the opinion of the court.

G. H. Browne, for the motions.

B. N. Lapham, against them.

AMES, C. J. The motion to recommit finds no sufficient support in the affidavits which accompany it, either upon the ground of surprise, or of the discovery of new and further evidence. If the claimant was surprised by the denial of his agency for the deceased, and was unprepared to meet it by proof, he should have applied for further time to the referees; who, whether he was entitled to delay or not, would, probably, have granted it to him. By going on, without asking for time, he completely waived his right to it; and his election, once made, cannot now, to the injury of the other party, be recalled, even

though, in consequence, the report is not all that he might desire.

The affidavits disclose the discovery of no new and further evidence in such sense as to entitle the claimant to a rehearing; but, at most, that having been a witness himself to his employment by the testator, and to the particulars and value of his services, and having adduced other evidence upon these points in confirmation of his own, he has since the hearing ascertained that there is other evidence to be found cumulative to this, and which, considering the nature of his claim, is not controlling in its character. If, indeed, his own testimony should be excluded, as upon a new hearing it ought to be, from the attention of the referees, it is very doubtful whether, even with the newly discovered evidence, his case would not stand in a worse plight, in matter of proof, before them, than it did at the former hearing. Under such circumstances we cannot longer delay the settlement of a large estate by allowing this motion.

The motion to discharge the rule altogether, upon the ground that two of the referees after their appointment, and before they had heard the case of the claimant, expressed opinions unfavorable to it, demands, on account of the nature of the cause alleged, the careful consideration of the court. Whilst in modern times courts have been more liberal in overlooking honest errors in referees and arbitrators, and mere defects of form in their reports and awards, they have been more strict in requiring from them the integrity and impartiality which belong to the judicial character. *Cleland & others v. Hedly*, 5 R. I. Rep. 163; *Strong v. Strong*, 9 Cush. 573. The partiality betrayed by the expression of an opinion by a referee for or against the case of either party before he has heard it, would, unless the parties had agreed to waive impartiality in the tribunal selected by them, be a good cause to invalidate his report, and to discharge the rule which appointed him. Under such circumstances the court would be bound to presume, notwithstanding the referee swore that his prejudice did not sway him, that the report was not the result of his fair and deliberate judgment, but of preconceptions, which placed him beyond the

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influence of both law and fact. *Fox v. Hazleton*, 10 Pick. 275; *Boston Water Power Co. v. Gray*, 6 Met. 169.

There is nothing in this case to indicate that the parties did not intend to submit their controversy to the arbitrament of impartial as well as of uncorrupt referees; and were we satisfied by the proof that either had in this respect been deceived, we should have no hesitation, upon his request, in freeing him from the partial judges, as well as from the partial judgment of his cause. The affidavits submitted to us do not, however, satisfy us that the claimant has suffered from, or been exposed to, the injustice of which he complains. There are but two affiants who support this motion: one swearing to the declarations made by one of the referees, which impeach his impartiality, and the other, to similar declarations made by one of the two others. Each of the referees impeached, explicitly denies under oath the charge made against him; and in addition to the fact that one of the affiants does not pretend to give the language of the referee, in the conversation with him to which he swears, but merely his inference from it, it would hardly do to consider the evidence, under such circumstances, in a better position for the motion than balanced; especially when we recollect that the referees were nominated by the claimant and selected by the respondent as just, uncorrupt, and impartial men.

In a balance of proof, the party moving can take nothing by his motion; and we must, for these reasons, overrule both the motions made to us, and order judgment to be entered confirming the report.

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EBEN SIMMONS v. MARINUS W. GARDINER, City Treasurer.

A notice given by the street commissioners of the city of Providence to the owner of two estates on the same street, that he must, before a time specified in the notice, alter and improve the sidewalk adjoining his *estate*, situated on the street, without specifying which estate, is bad for uncertainty; nor is it well served, under the statute "concerning sidewalks in the town of Providence," if the owner be a resident of the city, by being left, during his temporary absence, at his boarding-house, the statute in such case requiring personal service; and the neglect of the owner to improve the sidewalk adjoining that one of his estates intended by the commissioners, upon such notice, will not justify the city in assessing against, and exacting from the owner, the expenses paid by the city surveyor in making the improvement.

ASSUMPSIT to recover from the city treasurer of Providence, the sum of \$407.22, with interest, paid by the plaintiff to the city collector under protest; the ground of recovery being, that the same was illegally assessed against him by said city for the expenses of laying a sidewalk in front of his estate on Eddy Street, in said city. The case was submitted to the court, under the general issue, in fact and law, and the opinion of the court states all the facts necessary to make it intelligible.

James Tillinghast, for the plaintiff.

Clarke, City Solicitor, for the defendant.

BRAYTON, J. This action is brought to recover of the defendant the sum of \$407.22, the amount of a certain tax assessed against him for altering and amending a sidewalk in the city of Providence, which tax was paid by the plaintiff under protest, and which he claims was illegal and void.

The tax was assessed against the plaintiff under the provisions of an act entitled "an Act concerning sidewalks in the town of Providence." See Ordinances, City of Providence, 58, 59, 61. The first section provides, that sidewalks shall be built, altered, and repaired at the expense of the owners of the adjoining land. The second section provides, that the commissioners of sidewalks shall have power and authority to order and determine the height, width, and material of which the walks shall be built, and the manner of building and altering any sidewalks.

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The third section provides, that the commissioners, having determined the manner and within what time any sidewalk shall be built, altered, or improved, "shall cause written or printed notice thereof to be personally given to the owner of the adjoining lot if residing within the town, particularly describing the materials, width, height, and manner the sidewalk shall be built or the alteration made; but if the owner shall not reside in said town, then the notice shall be given to the tenant in possession; but if no tenant be in possession, then the same shall be published in one of the newspapers in said town of Providence for three successive weeks," and upon neglect by such owner to make or alter such sidewalk within the time limited, the commissioners may order it to be done at the expense of the owner of the adjoining lot and report the expense thereof to the assessors of taxes, who shall add it to the tax of the owner of such adjoining lot.

Upon the facts before the court, (a jury trial having been waived by the parties,) it was objected by the plaintiff, that the assessment was illegal and void for various reasons,—for defect of power in the commissioners to make the determination they did, that the place where this sidewalk was constructed was not a public highway, and that the notice given to the plaintiff by the commissioners, after determining what improvement should be made in the sidewalk, and within what time, was insufficient to render him liable for the expense of making such improvement. The last objection, viz.: that the notice given by the commissioners was defective and insufficient, is all that need now be considered. Assuming the power of the commissioners to make the determination provided for the second section of the act and by the amendment of 1841, and the place where the walk was made to have been a public highway, it would still be necessary, in order to charge the plaintiff for the improvement made against his land, that notice should have been given him by the commissioners of what was required by them to be done, and that it should be given in the mode prescribed by the act. It will be sufficient to state so much only of the evidence submitted as bears upon the question of notice.

The evidence upon this point was, that prior to 1847, there

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had been, and was, a street called "Eddy Street," extending from the central part of the city to a street called Point Street, where commenced the turnpike, called the Pawtuxet Turnpike, which extended thence to and beyond the city line; that in 1847, under and by virtue of an act of the general assembly, passed at the January session of that year, so much of said turnpike as was within the city limits was released to the city for a public highway, and has been since improved and repaired as such by the city; that it has never been named Eddy Street by the board of aldermen, but it was testified that this portion of the street was known as Eddy Street, and that it was sometimes called Pawtuxet Avenue.

The lot against which the sidewalk in question was built was upon that portion of the street formerly Pawtuxet Turnpike, and the plaintiff owned beside this lot other estates, north of Point Street, and bounding upon Eddy Street as it was, prior to 1847.

It further appeared, that the plaintiff was a resident of the city of Providence, in the family of a sister. The printed paper following was produced in evidence:—

"City of Providence, June 14, 1856.

"To Eben Simmons & Brother,—The surveyor of highways being about to pave Eddy Street, and make the same to grade, you are required by the street commissioners to alter and improve the sidewalk adjoining your estate, situated on the street about to be improved as aforesaid, and to make said sidewalk ten feet wide, covered with flagging stones, bricks or good gravel, as you may choose, and bounded on the outside with good curb-stones eighteen inches or more deep, seven inches or more thick, hammered on the upper edge and cut to a level; the height of said sidewalk is marked on the posts set up by the city, and if you have doubt the commissioners will show you the height, at the city's expense. The commissioners direct that said sidewalk be so altered, improved, and finished on or before the 30th inst.

By order of the Commissioners.

"CYRUS FISHER, Clerk.

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"N. B. If the curb-stones are furnished on or before the 21st inst. next, further compliance with the above order will be waived as to setting said curb-stones."

It appeared that this paper was left by one of the commissioners at or near the day of its date, at the place of residence of the plaintiff, but that said plaintiff was then absent from the city, and remained absent for some days; but that the said paper did some time after his return, come to his hands. This was the only notice attempted to be given by the commissioners.

The purpose of the notice required to be given was not merely to inform the land-owner of the width of the walk required and of the materials of which it should be made, but of the length thereof, so that the person intended to be charged with the improvement might be apprised, a sufficient length of time before the time appointed for its completion, of the quantity of materials required, and of the amount of labor necessary for its completion, and to procure them. For this purpose it would be necessary to know not merely the width of the walk required, but the length of that portion required of the party notified, and to this end, that he should be distinctly informed against what lands of his the work was to be done. If he own lots on different streets, then the lot upon which street; if different lots upon the same street, then against which of his lots upon that street. The plaintiff in this case was not so informed. He was notified to alter and improve the sidewalk adjoining his estate on Eddy Street,—one estate, in the singular, and not all his estates situated on that street. He is the owner of land adjoining Eddy Street, north of Point Street, as well as of the land against which the work was done, lying south of Point Street; and he was as much required to alter the sidewalk against his estate north of Point Street as against that lying south of it; and which was to be altered is left indeterminate.

In point of fact no improvement was contemplated by the commissioners to be made, or was made, on Eddy Street, except on that portion lying south of Point Street, or that part which

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had been turnpike; yet their notice relates to Eddy Street generally, and requires the plaintiff to alter the sidewalk against one of his estates adjoining it, but without informing him which. We are of opinion, in this view of the subject, that had the printed notice been delivered to the plaintiff personally, it would have been insufficient to make him liable, or guilty of neglect in making the required improvement against his estate.

But we think the notice insufficient for another reason: that it was not given to the plaintiff personally, as the act requires. He was a resident of the city at the time; and though the notice could not, on account of his temporary absence, be then served upon him, such absence does not make constructive notice sufficient; that is only to be resorted to in case the owner is not a resident. The leaving a copy at the usual place of abode of such person, is not serving him personally.

For these reasons judgment must be given for the plaintiff for the amount paid, with interest and costs.

6	259
17	564

ALBERT K. BARNES v. DANIEL W. VAUGHAN.

Where no particular place for payment is named in a note, payment must be demanded of the maker, in order to charge the indorser, on the last day of grace, either personally, or at his place of business or abode; and written notice to the maker, by mail, given by a bank with whom the note is left for collection, and previous to the note's falling due, that the note has been so left, and of the day of payment, will not be a sufficient demand upon the maker to render the indorser liable.

Assumpsit against the defendant as the indorser of two promissory notes for six hundred dollars each, made by one Nelson C. Northup, and payable, one in thirty-six, and the other in seventy-four months after date, to the order of the defendant, and by him indorsed to the plaintiff.

At the trial before the court, to whom the case was submitted in fact and law, under the general issue, it appeared that the notes, which were not made payable at any particular place, had been left by the plaintiff at the Mount Vernon Bank, in Foster, for collection; and that the only demand of payment

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made upon Northup, the maker, was by the usual printed bank notice, mailed to him by the cashier of the bank, and directed to him at Providence, where he lived, in the early part of the months in which they respectively fell due, although at what times precisely, the cashier of the bank could not recollect. Due notice of non-payment by the maker was proved to have been given to the defendant.

Bartlett, for the plaintiff.

Notice through the post-office, of demand of payment of the maker, is sufficient. *Manchester Bank v. Fellows*, 8 Foster, (N. H.) R. 302; *Kelsie v. Jones*, 3 McLean, R. 96; *Foster v. Smith*, 2 Pick. 338.

Burgess & Brownell, for the defendant.

1. A note, specifying no place of payment, must be presented to the maker personally, or at his residence or place of business, when due; and neither bankruptcy, insolvency, nor death of maker will dispense with the necessity for such demand, and due notice to the indorser. *Edwards on Bills and Notes*, 159, 486; *Story on Promissory Notes*, §§ 201, 203, 241; *Anderson v. Drake*, 14 Johns. R. 114; *Taylor v. Snyder*, 30 Denio, R. 145; *Spies v. Gilmore*, 1 Coms. R. 321. ●

2. The notes in suit were entitled to grace, and should, therefore, have been presented to the maker on the third day of grace, and payment demanded. *Edwards on Bills and Notes*, 525, 527; *Cook v. Darling et al.* 2 R. L. 385; *Bank of Washington v. Triplett*, 1 Pet. R. 31; *Wood et al. v. Corl*, 4 Met. R. 203; *Griffin v. Goff*, 12 Johns. R. 423; *Jackson v. Newton*, 8 Watts, R. 401.

3. An indorser of a note does not dispense with the necessity of presentment for payment and notice of non-payment, by taking from the maker security against his liability. *Seacord v. Miller*, 3 Kern. R. 55; *Woodman v. Eastman*, 10 N. Hamp. R. 359; *Spencer v. Harvey*, 17 Wend. R. 489; *Kramer v. Sanford*, 4 Watts & Serg. 328; *Creamer v. Perry*, 17 Pick. R. 332.

BOSWORTH, J. The defence to this suit is, that no legal and proper demand was made on the maker of the note; and that therefore the indorser, who is here sued, is discharged. The rule of the common law is, that in order to charge the indorser,

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demand must be made on the maker for payment on the very day on which the note becomes due. In case the note on its face is made payable at a particular place, as at a bank named, it is necessary, and only necessary, to make demand at such place; but if no place of payment is named in the note at which the note is payable, it is necessary to present the note to the maker personally, or at his place of abode or business, before the indorser can be made chargeable. In this case, no place of payment was mentioned in the notes. The notes were left at the Mount Vernon Bank for collection; and it is agreed, that the maker had notice before the day of payment that they were there for that purpose. This notice could not avail to make the notes payable at said bank. The maker had not by the terms of his contract agreed to pay the notes at that bank; and a demand there was no demand upon him. It was necessary that demand should be made upon him personally, or at his dwelling, or place of business, on the last day of grace. No such demand was made, and the indorser therefore was never charged.

Judgment must therefore be rendered for the defendant, for his costs.

CHESTER COOPER & others v. CHARLES D. W. COOPER.

A devise of lands to "my grandson, Stephen Cooper (son of Stephen), my aforementioned grandson to come into possession at twenty-one years of age, and to have and to hold the abovenamed bequest to him during his natural life; and after his decease, I give the premises unto his male heirs, equally between them; and, for want of heirs male, then to go in equal shares to his daughters," vests an estate tail in Stephen, the grandson, under the rule in Shelley's case; the clause of the statute of wills in relation to the creation and continuance of estates tail, not being applicable to such a case.

To bar an estate tail, the deed of the tenant in tail, if executed and acknowledged as required by section 8, ch. 145, of the Revised Statutes, need not, as against the heirs of the tenant, be recorded in the records of the town where the land lies.

TRESPASS and ejectment, to recover possession of a lot of land, containing about thirty acres, and situated partly in the town of Gloucester, and partly in the town of Burrillville.

The suit, which was an amicable one, was submitted to the court upon the following agreed facts:—Moses Cooper, for-

6	261
10	352
13	714
6	261
17	438
6	261
27	304

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merly of Gloucester, deceased, by his last will and testament, duly proved, gave the lot of land declared for to his grandson, Stephen Cooper, describing the estate of his grandson therein in these words :—

“ My aforementioned grandson, Stephen, to come into possession at twenty-one years of age, and to have and to hold the above-named bequest to him during his natural life ; and after his decease, I give the premises unto his male heirs, equally between them ; and for want of heirs male, then to go in equal shares to his daughters.”

The defendant derives his title under a sale on execution of Stephen Cooper's interest, and also under a warranty deed of the premises and other lands, executed by said Stephen, in his lifetime, for the nominal consideration of four thousand dollars, and acknowledged before the town clerk of Gloucester, and recorded in the land records of that town. After said deed was thus acknowledged and recorded, Stephen Cooper, on the 28th day of May, 1822, again acknowledged said deed before the court of common pleas, for the county of Providence, then in session at Providence, and again, on the 28th day of September, 1822, before the supreme judicial court, then in session for said county. The deed was recorded after these acknowledgments in court, to wit : on the 14th day of November, 1822, in the land records of the town of Burrillville, but not after being so acknowledged, in the land records of the town of Gloucester.

Stephen Cooper died some time prior to April, in the year 1853, and the plaintiffs are his three only sons, born, respectively, in 1810, 1813, and 1821.

The cause was submitted by *B. N. Lapham*, for the plaintiffs, upon the following brief, and by *S. S. Lapham*, for the defendant, without argument.

B. N. Lapham, for the plaintiffs.

The plaintiffs in this action claim the land described in this declaration under the will of Moses Cooper, because they claim that under said will their father, Stephen Cooper, took no more than a life-estate, and that on his decease they became entitled to the real estate given to him for life. In the construc-

tion of wills, the intention of the testator governs and controls unless inconsistent with established rules of law. Under the will it is evident that Moses Cooper intended that his grandson, Stephen Cooper, should take a life-estate, and that his children should take the remainder, the sons taking first; but if no sons, then daughters. The expression, "*male heirs*," should be construed to mean sons; the expression, "*daughters*," being used immediately after, and in the same connection. 2 Jarman on Wills, 301, 302. The question under this will is, did Stephen Cooper, Jr. take an estate for life or an estate tail? It could only be made an estate tail by the application of the rule in Shelley's case. That rule does not apply here.

1. The reason of the rule is obsolete. It is contrary to the policy of our laws, and is only applied to cases falling strictly within the letter of the rule.

2. When instead of the words "*heirs of the body begotten*," the words, children, issue, lawful issue, sons, are used, the rule does not apply. 1 Hilliard on Real Property, 643, 650; 6 Greenleaf's Cruise on Real Property, 290, 297, 650, and note; *Sisson v. Seabury*, 1 Sumner, 235, and the cases there cited, most of the authorities being examined and commented on in that case. In this class of cases the first devisee takes only a life-estate. See, also, *Manchester v. Durfee*, 5 R. I. Reports, 555. "*Children*," in a "*will*," is a word of purchase.

3. When the words, "*heirs of the body*," are used, if there are any other words used showing that by "*heirs*" the testator meant a class of persons or a description of persons, or children, or sons, or daughters who were to take, the first devisee takes a life-estate, and the class of persons designated take as purchasers; the word "*heirs*" being construed as a word of purchase, and not as a word of limitation. 1 Hilliard on Real Property, 539-650, 651 and 652; 6 Greenleaf's Cruise on Real Property, 291; 2 Jarman on Wills, ch. 38, and more particularly pp. 301 and 302; Archer's case, 1 Co. 66; Wilde's case, 6 Co. 17; *Clark v. Day*, Moore, 593; Cro. El. 313; Wedgward's case, 1 Rol. Ab. 837; *King v. Melling*, 1 Vent. 231; *Sisson v. Seabury*, 1 Sumner, 235. The words in this will, "*male heirs*, and for want of heirs male, then to go in equal

shares to his daughter," bring the case within the operation of the 2d section of the Rev. Stats., ch. 154, the same being in force when the will was made and admitted to probate; Statutes of 1798, p. 279; the words used being the same in meaning as the words "children or issue." The remainder in the estate had vested in the sons of Stephen Cooper, Jr. before the same was attached, and before he made any deed of the same, one son having been born in 1810, one in 1815, and the other in February, 1821, and the attachment having been made in November 15, 1821, and the deed having been executed some time after. If we allow that Stephen Cooper, Jr. took an estate tail, ought not the deed, with the acknowledgments before the court of common pleas and the supreme court, to have been recorded in the town clerk's office of the town of Gloucester, in order to bar the entail of the land in that town?

BOSWORTH, J. This case depends upon the construction of a devise in the will of Moses Cooper. The devise is to "my grandson, Stephen Cooper (son of Stephen), my aforementioned grandson to come into possession at twenty-one years of age, and to have and to hold the abovenamed bequest to him during his natural life; and after his decease, I give the premises unto his male heirs, equally between them; and, for want of heirs male, then to go in equal shares to his daughters."

By the established rules of construction, the words "*male heirs*," in this devise, are words of limitation; and enlarge the estate devised to Stephen Cooper to an estate tail. This is established by the rule in Shelley's case. The case of *Manchester & wife v. Durfee*, 5 R. I. Rep. 549, recognizes this as an inflexible rule of law; and further decides, that our statute of wills, in its relation to the creation and continuance of estates tail, (Rev. Stats. ch. 154,) is not applicable to a case like this, to alter the rule of the common law.

The estate of Stephen Cooper then being an estate tail, was an estate which might, under our statute, (Revised Statutes, ch. 145, § 3,) by a deed duly executed by the person seised in fee-tail, under his hand and seal, and acknowledged before the supreme court or any court of common pleas in this state,

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be conveyed in fee-simple; and the statute declares, that such conveyance shall vest an estate in fee-simple in the grantee, his heirs and assigns, and shall bar the tenant in tail, his heirs and assigns, and all others who may claim the same in remainder or reversion, expectant upon the determination of such estate-tail. It is agreed that such a deed was executed by Stephen Cooper, embracing the land mentioned in the plaintiffs' declaration; and that the defendant, by several mesne conveyances, derives his title from the grantee mentioned in this deed. We are of opinion that this deed vested the title in the grantee in fee-simple, and the defendant taking that title, now has the estate.

The agreement of the parties further shows, that the deed of Stephen Cooper, before referred to, was first executed in the ordinary form before a magistrate, and recorded in the land records of the town of Gloucester, where a part of the premises was situated; and that subsequently it was acknowledged before the court of common pleas and supreme court, and recorded in Burrillville, where another part of the premises was situated, but not again in Gloucester. Would this defeat the operation of the deed, as a bar of the entail of the land in Gloucester? To this it may be answered that the statute,—Rev. Stats. ch. 145, sec. 3,—which provides the mode of barring the entail, does not require a record in the town clerk's office; but provides that a deed, executed and acknowledged in manner therein provided, shall bar the tenant in tail, his heirs and assigns, and all others who may claim the same in remainder or reversion, &c. The general statute regulating conveyances of real estate provides, that all conveyances, &c. of lands shall be void unless acknowledged and recorded, as aforesaid, *i. e.* in the office of the town clerk of the town where the lands or tenements lie; but provides, that between the parties and their heirs such conveyance shall nevertheless be binding. These plaintiffs are heirs of Stephen Cooper, and between them and the defendants the conveyance without record passed the estate.

Judgment for the defendant.

6	266
7	410
6	266
130	248

ORRAY TAFT & COMPANY v. HANDEL N. DAGGETT.

The bar of the statute of limitations cannot, in Rhode Island, be indefinitely postponed by continuances of process issued from term to term, as under the English practice and statutes; but the 8th section of ch. 177, of the Rev. Stats. allows *one year*, and one year only, after the defeat, from inability to serve the writ, of an action commenced in due time, within which to bring a new action for the same cause.

ASSUMPSIT, to recover four hundred and thirty-five dollars and sixty cents, the amount of a promissory note, dated February 3, 1852, and made by the defendant, together with one Homer M. Daggett, his copartner in the firm of H. N. & H. M. Daggett, to the plaintiffs, and payable to the plaintiffs or order, six months after date.

The writ was dated June 28, 1859, and was served by an arrest of the defendant on the same day.

Pleas, the statute of limitations and the general issue.

The plaintiff joined in the general issue, and to the plea of the statute, replied in substance, *first*, that the causes of action did accrue to the plaintiff within six years next before the commencement of the action, with a conclusion to the country; and, *second*, that within the six years, to wit: on the 17th day of July, 1858, for the recovery of said note, they sued out of the supreme court for the county of Providence, a writ of arrest in assumpsit, against the defendant and the said Homer M., and on the same day delivered said writ to a deputy sheriff of the county of Providence for service; that on the fourth Monday of September, 1858, on which day said writ was returnable to said court, the said deputy sheriff returned the said writ to said court, without service, for want of the body, goods, and chattels of said Handel and Homer to be by him found within his precinct; that on said fourth Monday of September, 1858, the plaintiffs came by their attorney, Rollin Mathewson, to said court, and offered themselves against said Handel and Homer; and that said Handel and Homer, and neither of them, appeared in said court according to the exigency of said writ; that the plaintiffs thereupon sued out another like writ, returnable to

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said court here on the fourth Monday of March, 1859, for the said Handel and Homer to answer the complaint of the plaintiffs in the action aforesaid; that the same day was given to the plaintiffs there, &c. where said last-mentioned writ afterwards, and before the said return thereof, to wit: on the 24th day of February, 1859, was delivered to another deputy sheriff of said county, who, on the said fourth Monday of March, 1859, made the like return to said court; and that the said Handel and Homer, although the plaintiffs appeared on that day and offered themselves against them, did not appear at said court to answer the exigency of said writ; that, thereupon, the plaintiffs sued out another like writ, returnable to said court here, on the fourth Monday of September, 1859, for the said Handel and Homer to answer the complaint of the plaintiffs in the action aforesaid, and the same day being given to the said plaintiffs there, &c. on the same day the plaintiffs by their said attorney, and the said defendant, Handel N. Daggett, by his attorneys, C. T. & J. Tillinghast, came according to the exigency of said last-mentioned writ; and the plaintiffs offered themselves twelve days before the return of said writ, to wit, on the 14th day of September, in the year last aforesaid, against said Handel N. Daggett in the action aforesaid; as by the record and proceedings thereof remaining in said court here more fully and at large appears. That said several writs were respectively so sued and prosecuted by the plaintiffs against said Handel and Homer, with the intent to implead said Handel and Homer upon and for the several causes of action in the declaration mentioned, and to cause them to appear in the said court here to answer the complaint of the plaintiffs in said action, and with intent to declare against them for the said several causes of action in the said declaration mentioned; that according to their said intent the plaintiffs, afterwards, to wit: on the day and year last aforesaid, declared upon said last-mentioned writ against the said Handel N. Daggett, and that said several causes of action in the declaration mentioned did accrue to the plaintiffs within six years next before the issuing against the defendant of said last mentioned writ, and that this they are ready to verify, &c.

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The defendant joined issue upon the plaintiffs' first replication, and to the second rejoined, that there is not any record of the said original writ sued by the plaintiffs upon the 17th day of July, 1858, and of the return thereof, remaining in the court here, and that the writ in this cause upon which the defendant was arrested and upon which the plaintiffs have declared, is an original writ of arrest, sued out by the plaintiffs in this cause on the 28th day of June, 1859, and is not a continuation of, or an alias or pluries of said writ sued out upon the 17th day of July, 1858.

To this rejoinder the plaintiffs demurred generally, and the defendant joined in demurrer.

Markland, for the plaintiffs.

The authorities are all agreed, that where to a plea of the statute of limitations the plaintiff replies the issuing of process with continuances, as is the case here, the first should be stated to have been returned. 2 Saund. 63 *d, e*; Willes, 255; 2 Bos. & Pul. 157; Angell on Lim. § 318. As to this there is no dispute, and the replication, which is in the most approved form, is framed accordingly. 3 Chitty's Pl. 1153; 4 Barn. & Cressw. 625. But the answer relied on by the plea is the want of enrolment of the first writ; and that because the last writ upon which the defendant was arrested was an original writ and not an alias or pluries writ, it is not a continuance of the first writ. These matters, however, are no answer to the plaintiffs' replication. With us, enrolment of the first writ was unnecessary, there being no rule of law or practice in this state on the subject, and the nature and simplicity of our practice being against it. Nor was it necessary that the last writ should have been an alias or pluries. In New York, and also in England, prior to the passage of the uniformity of process act, 2 Wm. IV. c. 39, § 10, both these matters were mere matters of practice. 1 Tidd's Pract. (1st Am. ed. 1807), 91; 3 Chitty's Gen. Pract. 406; *Plummer v. Woodburne*, 4 Barn. & Cressw. 625; *Taylor v. Hopkins*, 5 B. & Ald. 489. The defendant's notion is evidently founded upon this practice. But the English practice is materially different from ours; with us, the sheriff does not return the writ to the court, but to the attorney, from whom he received

it; and the cause is never docketed until the declaration is filed pursuant to the statute. Moreover, we have no process roll, as they have in England, distinct from the appearance and judgment roll. 1 Tidd's Pract. (1st Am. ed., Pref.) Nor is there any rule of law or practice for the preservation of such writs. To file them would expose them to loss. Indeed, in England, it seems, the practice was not to file the first writ until it became necessary to do so in support of a replication stating a writ issued, to save the statute, with continuances as here. 3 Chitty's Gen. Pract. 406. But this was not done, because there was no precedent for, nor anything in our practice, to authorize it. The replication contains sufficient notice of the existence of the writ, which being in fact returned, as is admitted by the plea, though not enrolled, the defendant should have traversed the return and not the enrolment, to agree with our practice. The defence of want of enrolment, therefore, is a surprise; and the court will not suffer the plaintiffs to lose their debt for want of a technical formality, when they have shown their non-acquiescence in the bar of the statute by issuing their writ in time, and by proper continuances, which are merely formal, and may be entered at any time. 6 Term Rep. 257; 7 Ib. 618; 3 Brod. & Bing. 212; 1 Bing. 324; 5 Barn. & Cressw. 341. The plaintiffs have connected this writ with the process upon which the defendant was arrested, and to prevent such loss the court may, if they think it necessary, permit the record to be amended by filing the writ now. 3 Chitty's Gen. Pract. 407; *Smith v. Bower*, 3 Term Rep. 664 (per Ashurst, J.); Angell on Lim. § 320; *Plummer v. Woodburne*, 4 Barn. & Cressw. 625; Rev. Stats. 445, § 5. As to the matter that the last writ is not a continuance of the first because it is an original and not an alias or pluries, that is matter of law, and in this respect the plea is bad, as putting in issue matter of law to be tried by the jury. 1 Chitty's Plead. 540. And being matter of law it is not admitted by the demurrer. Gould's Plead. 471, § 29. But as to the fact that the last writ was an original one and not an alias or pluries, that is undoubtedly admitted by the demurrer, if well pleaded; but what of it? As to this, it is sufficient to say, that it is the only alias known to our practice,

even in the case of an alias execution, which is the only alias writ known to us, and which there is nothing to distinguish from an original, but a simple indorsement of the word *alias* by the clerk. But it was not necessary that it should have been an alias or pluries. The replication does not allege that it was, nor was it necessary. The plaintiffs say that all the writs were to recover in respect of the same cause of action. The last writ here is undoubtedly a good continuation of the first. *Plummer v. Woodburne*, supra; 3 Chitty's Plead. 1152, n. f.; 3 Black. Com. 287, 288.

James Tillinghast, for the defendant.

1. The writ upon which the defendant is arrested must be a *continuance* of the original writ; otherwise it does not avoid the bar of the statute. 2 Saunders's Rep. 63, d. E. J. note b.; *Soulden v. Van Rensselaer*, 3 Wend. 476; *Smith v. Bower*, 3 Term Rep. 662, particularly per Buller, J.; *Davis v. West*, 5 Wend. 63; *Bank of Orange Co. v. Haight*, 14 Wend. 83; *Hume v. Dickinson*, 4 Bibb, (Ky.) 276; 2 U. S. Dig. 820, § 644. Our writ is not a *latitat*, but an original writ, and continuances are not necessary when the process is by an original. 1 Wils. 167, 168; Angell, Lim. § 318.

2. The return of the original writ, and the continuances, must be shown by the record. They cannot be shown by parol. See cases cited above. See, also, *Fowler v. Williams*, 3 Brevard, (S. Car.) 414.

AMES, C. J. There is nothing in our practice which warrants, as this replication supposes, the continuance from term to term of the process for the commencement of an action, by which the bar of the statute of limitations may be indefinitely postponed. We have no process roll upon which to enter each successive writ returned *non est*, whether at a time regulated by practice or by statute, — no alias or pluries summons or capias issuable in renewal of a former writ, to be filed in court, with or without return, as the practice, or statute regulating it, may require; and the old general English practice in these respects, is quite as foreign to us, and finds as little in our modes of proceeding to rest upon, as the statutes of 2 and 3 Wm. IV. ch. 39, and 15 and 16 Vict. ch. 76, which have successively modified it.

But more than this, the 8th section of chap. 177 of our Revised Statutes expressly allows and limits the period of one year, after the abatement avoidance or defeat, "for any matter," of an action commenced within the period of general limitation, within which, though beyond that period, a new action may be commenced for the same cause. By this plain and comprehensive provision, applicable to every action commenced within time, which, without coming to the merits, has been defeated or avoided, our legislation has recognized, as far as was deemed proper, the policy of the English practice, as well as provided for other cases not reached by it. If, therefore, the entire novelty in our practice of this mode of indefinitely postponing the operation of the statute did not condemn it, this clause of the statute, as inconsistent with it, certainly would.

Besides, the effect of allowing this novelty would be to set up a mode in which the amendment of 1857, in respect to absent defendants, might be contravened. By that amendment, found in the 5th sect. of chap. 177 of the Revised Statutes, absence from the state saves the bar between, and only as between, residents; leaving it in force, as it ought to be, between citizens of other states, and between our own citizens and such. Against absent residents no such practice is needed to keep alive a cause of action. The citizens of other states are properly suable at home in the state or federal courts, — tribunals quite sufficient to answer all the demands of justice; and ought not, because at home, to be forever exposed by such continuances, to suit here upon claims long barred by the law of their respective domicils, the policy and even terms of which are, in general, so precisely identical with our own.

The effect of the 8th section of the statute upon this action, in the position in which the pleadings present it, remains, however, to be considered. The note counted upon fell due in the early part of August, 1852; and would consequently be barred by the six years' limitation of the statute in the early part of August, 1858. Now, the replication avers, that on the 17th of July, 1858, before the bar was complete, the plaintiffs commenced an action upon this note against the defendant, by a writ issued out of the clerk's office of this court, returnable on

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the fourth Monday of September, 1858, and that this writ was, on that day, duly returned *non est*, by the deputy sheriff charged with its service. It was long ago decided here, that the mere issuing of a writ with the intent to have it served, was the commencement of an action within the meaning of our statute of limitations (*Hall v. Spencer*, 1 R. I. Rep. 17); and the avoidance or defeat of the plaintiffs' action thus commenced, by their inability to serve the defendant, brings it, in our judgment, within the saving of the above section of the statute. This writ, by our law, expired twenty days before the fourth Monday of September, 1858, the first day of the court to which it was returnable, which fell on the seventh day of September of that year; and as the present writ was issued on the 28th day of June, 1859, this action was commenced within a year of the defeat of a former action commenced within the time of general limitation, and so within the time in such case limited by the statute.

With surplusage, it is true, the replication thus sets up facts which avoid the bar of the statute; and there is nothing in our law or practice which requires, as the rejoinder, to be a good one, supposes, that an ineffectual writ must be recorded in the court which issues it, in order that it may, as the commencement of an action, extend the time of suit.

The demurrer to the defendant's rejoinder must therefore be sustained, and the plea of the statute overruled.

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The supreme court has, under ch. 183, sect. 2, of the Rev. Stats., power to entertain a petition of a party erroneously nonsuited by the court of common pleas, filed within one year of the nonsuit, although such nonsuit was not caused by any accident, mistake, or other unforeseen cause, but was deliberately ordered by the common pleas; a party improperly nonsuited by the court, when he had a right to the judgment of the jury on his case, not having had "a full, fair, and impartial trial," in the sense of the statute.

A party aggrieved by the ruling of the court of common pleas in matter of law, and whose

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bill of exceptions has been duly allowed by the judge who tried the cause, but has been dismissed by the supreme court because he had neglected to give bond to prosecute his exceptions as required by ch. 192, sect. 17, of the Rev. Stats., may, nevertheless, proceed, for the same cause, by petition for new trial in said court, under ch. 198, sect. 2, of the Rev. Stats.

A petition for a lien under the mechanics' lien law, filed against two persons, as joint contractors for the work done and materials furnished, is not supported by proof that the contract was made by one of them; and in case there be not sufficient evidence that the contract was joint, to be weighed by the jury, may be taken from them and dismissed by the court, as, under like circumstances, a nonsuit may be ordered in an action at law.

PETITION for the new trial of an application for the enforcement of a lien against the Manchester Print Works, in Smithfield, under the mechanics' lien law, for work done and materials furnished by the plaintiffs to Edward P. Patterson and Theodore Schroeder, as joint contractors for the same. The application, which was made before the jurisdiction over this subject was vested in the supreme court by petition in equity, was tried upon the question of lien or no lien, at the December term of the court of common pleas for the county of Providence, 1857, before Mr. Justice *Shearman*, sitting with a jury. At the trial it appeared that the claim of the applicants, who were steam-engine and boiler-makers and machinists, was for the sum of \$10,848.54, balance of account, for work and materials done and furnished in the erection of the Manchester Print Works, so called, in the town of Smithfield, and in the fitting of the same with a steam-engine, shafting, piping, gearing, and pulleys, suitable for such an establishment. The work was originally contracted for by the defendant, Schroeder, under a written agreement signed by him and the plaintiffs, and bearing date the 22d day of August, 1855. By a subsequent agreement executed on the third day of November, 1855, by the plaintiffs, Schroeder, and the defendant Patterson, referring to and reciting parts of the former agreement, and that Schroeder has since authorized Patterson to use and occupy the above print works for the term of one or two years, according to the terms of the agreement of Schroeder with one Joseph Smith, the owner of the works, and to place therein and remove therefrom any fixtures at his pleasure, it was agreed, that the plaintiffs should go on and complete their contract with

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Schroeder, and that Patterson should give his notes for, and pay the consideration for the same, in the place of Schroeder, as stipulated in the agreement between the plaintiffs and Schroeder; and that "the engine, shafting, pulleys, and pipes, and all other articles furnished by them (the plaintiffs) in completing the same, together with the value of all the labor bestowed upon the same, shall be the property of the said Patterson from the time of the delivery thereof upon said works and the performance of said labor." The agreement then went on to provide for a renewal of certain notes to be given by Patterson for the work and materials to be furnished under the contract, and to provide that notwithstanding the change thus made, the plaintiffs should retain, as security for Patterson's performance of his contract to pay for their work and materials, a certain mortgage on the personal property of Schroeder, originally given by him to them to secure his payments to them. Between the dates of these two agreements, to wit: on the 30th day of October, 1855, Schroeder, who held the print works under an agreement with Smith, the owner, by virtue of which he was to occupy and to have a right to purchase them upon certain agreed terms, executed a lease of them to Patterson for one year, with a right of renewal in either party upon the same terms for another year, and in the lease stipulated, in substance, that the fixtures and machinery put into the works by Patterson should remain the property of Patterson, and that he should have the privilege of removing them, and that for the reimbursement of any sums advanced by Patterson towards Schroeder's contract with Smith to purchase the works, Patterson should be substituted to all the rights of Schroeder. To this contract between Schroeder and Patterson, Smith, the owner of the works, by a writing of the same date, gave his assent.

The applicants having submitted to the jury at the trial the above agreements, and some deeds not pertinent to the issue, but which merely traced the title to the print works from Patterson to Schroeder prior to the accruing of Smith's title to the same, in proof that Schroeder was a copartner with Patterson at the time they furnished the work and materials, produced testimony to the statements of Benjamin Cozzens, made

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previous to Patterson's coming to the works, that Schroeder was going to have some one with him to carry them on, and afterwards, that it was Patterson,—and that the witness, who was one of the applicants, understood that Cozzens was acting for Schroeder and Patterson; also, the testimony of another of the applicants to Schroeder's declarations that Patterson was to be concerned with him, and to have one fourth of the concern and Schroeder the other three fourths,—and testimony that Schroeder gave the orders and directions as the work was going on; and lastly, the testimony of Patterson himself, that after the above contract of October 30, 1855, made by him with Schroeder, he considered himself in the sole possession of the print works, and so remained until his assignment for the benefit of his creditors in 1857; that Schroeder and himself were not actually copartners from said 30th day of October, 1855, but were, by their agreement, to be copartners from the time that Schroeder should settle his debts, and that the witness might have said to one of the applicants that Schroeder was interested in the profits from said 30th of October, and now supposed, that if there had been any profits, Schroeder would have claimed three quarters of them, but that, in fact, there was no understanding or contract about it, other than that Schroeder was to be manager of the works at a salary, and was to be a copartner with the witness when his debts were settled, taking an interest of three quarters of the concern.

The applicants having rested their case, the respondents, without producing any evidence, moved that the applicants should become nonsuit, or the petition be dismissed, because, in substance,—1st, Smith, the principal owner of the works, against which the lien was sought to be enforced, was not notified and had not appeared to the same; 2d, because the applicants, pursuing upon a joint contract of Patterson and Schroeder, had by their written evidence shown only a several contract with Patterson, which their parol evidence had no tendency to vary; 3d, because the applicants had shown no title or interest in Schroeder to the articles furnished by them, or to the real estate upon which they were placed, but that he had no interest in either; and that Patterson had no interest in

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the real estate except an assignment of a lease, under which he had wholly ceased to act or possess before the commencement of this process or his default in paying the notes given for the work and materials; and that the parol evidence introduced by the applicants had no tendency to prove any joint interest of Schroeder and Patterson in the articles furnished by the applicants, or in the real estate against which they sought to enforce their lien; and, lastly, because neither the notice filed in the town clerk's office, nor the petition, contained "the particular description," required by the 7th and 9th sections of the lien law, of the buildings, improvements, and lands, and of "the estate and title in the same," upon which the applicants claim a lien, and "to whose estate therein the account or demand referred," and what was stated therein concerning "what and whose estate therein" the lien was claimed upon, was shown by the applicants to be untrue.

The court having, upon this motion, dismissed the application, the applicants excepted, and procured an allowance of a bill of exceptions stating substantially the above facts, in order that the questions of law arising thereon might be taken to the supreme court for consideration and judgment. The copy and bill of exceptions were duly filed with the clerk of this court at the March term at Providence, 1858, but no bond to prosecute the appeal by way of writ of error having been filed, as required by chapter 192, sect. 17, of the Revised Statutes, this court, upon motion of the respondents, dismissed the bill of exceptions. The applicants, thereupon, at the same term, filed in this court this petition for a new trial, alleging as grounds thereof the matter of their bill of exceptions, and as an excuse for not giving bond as aforesaid when they carried up their exceptions, that, as their attorney swore, he had overlooked the change made as he alleged by the Revised Statutes, in requiring such bond.

This petition was submitted to the court upon written arguments.

Thurston, for the petitioners.

Cozzens, for the respondents.

BRAYTON, J. The first objection made by the respondents in

this case is, that the court has no power to grant the petition, — that there are but two classes of cases in which a new trial can be granted by the court, into neither of which does this case fall; that the statute gives the court power to grant new trials, *first*, where by reason of accident, mistake, or any unforeseen cause judgment has been rendered in such suit, on discontinuance, nonsuit, default, or report of referees, or, that such party or garnishee had not a full, fair, and impartial trial in such suit; and, *secondly*, where there has been a trial by jury, a new trial may be granted for such reasons as new trials are usually granted at common law.

The petitioners say, that the judgment of nonsuit in this case was not rendered by reason of any accident, mistake, or unforeseen cause, but was rendered, after a full hearing and argument of the questions determined, and that there has been no trial by jury.

For the purpose of determining the question here raised by the respondents, we must assume that though the judge conducted fairly and impartially, yet that the nonsuit was erroneously ordered, and the petitioners ought rightfully to have gone to the jury upon the testimony in the cause; that there was evidence for them to weigh and consider; and that the petitioners had the right to their judgment upon it. Whether there was such error, must be the subject of inquiry upon the merits of this petition. The question now is of jurisdiction.

It cannot be said that by reason of any accident, mistake, or any unforeseen cause the nonsuit was ordered; but this is not the only cause why a new trial should be granted in a case where there has been no trial by jury. In every case in which it shall be made to appear that the party petitioning has not had a full, fair, and impartial trial, the statute empowers the court to grant a trial, or new trial, as the case requires. To arrive at the conclusion, that no trial can be granted in case of nonsuit, unless it be shown that the nonsuit has been rendered by reason of accident, mistake, or unforeseen cause, it would be necessary at the same time to conclude, that in every such case the party has had a full and fair trial of his cause. What is a full and fair trial, in the sense of this statute,

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when a party has the right to submit his cause to a jury, and has evidence which they alone have a right to weigh, and upon which the court has no right to pass judgment? Can the party be properly said to have had a full and fair trial when he has been deprived of all opportunity of obtaining, upon the facts of his case, the judgment of a jury, to whose verdict he has a right? Has he a full trial without this? We think he has not. A full and fair trial must mean a full trial, fairly conducted before the tribunal before which he has the right to go; and if that tribunal be the jury, he is deprived of a full and fair trial unless he is allowed to submit his case to their determination. It matters not in such case, that the party has been fairly, fully, and impartially heard by the judge upon the question whether his cause shall be submitted to the jury, if, under the law, he had a right so to submit it. In either case, the result is the same. The party is equally cut off from a full trial, by an honest error, as by a partial judgment.

The judge who heard this cause was of opinion that there was no evidence to go to the jury,—none which the jury could properly consider; that the petitioners had not made out a *prima facie* case. If he was right in this, the petitioners have no ground of complaint; for in that event, they have had all the trial which the law contemplates they should have. If, on the other hand, the judge was wrong, he has deprived them of their right of further trial before the jury.

Another objection urged against the consideration of the merits of this petition, and against the relief prayed for, is, that as the petitioners filed these exceptions in the court below, which were regularly allowed by the judge, but which they neglected to prosecute, and, as the statute gives no appeal in cases of this kind, but provides that the party aggrieved may file his exception to any ruling of the court, in any matter of law, apparent upon, or brought upon the record by such exception, and also provides the mode in which they may be heard here, that that mode is the only one by which the party can be relieved from any errors in law happening in the trial below,—that his only remedy is by bill of exceptions.

This point may require a careful consideration. The provis-

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ions of the act referred to, empowering this court to grant new trials for the causes therein stated, in substance, as it now stands in the Revised Statutes, have been in force for much more than half a century. Under them, the party might apply for a new trial at any time within one year after the judgment should have been rendered. Down to the year 1848, every party aggrieved by any judgment of the court of common pleas, rendered in any action originally brought there, might appeal to this court, by which all questions, both of law and fact, were open here, provided the appeal were taken within five days after the rising of the court. During all that time, it was not doubted that new trials might be granted for the causes stated, provided the petition therefor were filed within one year, notwithstanding the right of appeal, if the time of appeal were passed.

In June, 1848, the right of appeal was in a large class of cases taken away; and in such cases the right to be heard upon exceptions to the rulings of the court in matters of law only, was given; the effect of which was to deny an appeal in matters of fact, but to retain it in matters of law. The provision of the statute for granting new trials has, however, remained the same, including not only cases by law appealable, but cases not appealable, but in which the right to be heard by exceptions was given. Whether, therefore, the party has a right to appeal, or only to except in matters of law, the provision for granting new trials is the same; and the party may have it, for any of the causes there stated, at any time within one year after judgment rendered; and there is no exception in case the party has the right to appeal, and omits to do so; or where he has a right to except, and omits to do so.

If the position of the respondents be correct, no such petition could be preferred, and no trial or new trial granted, in any case where the right of appeal existed, at least for any cause known to exist before the time of appeal had passed, and could not be, for any cause, even for which new trials are usually granted at common law, except for newly discovered evidence. The language of the statute is much too broad for any such limited construction.

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The only plausible ground upon which the respondents can stand is, that where exceptions are taken, the statute declares that the party shall give bond, and enter his case at the next term of the supreme court; not that he *may*, but that he *shall* so enter it. But the provision is the same in case of appeal; that the appellants shall give bond, and shall file the reasons of appeal at the next term of the supreme court. We cannot, therefore, distinguish the cases, or deny the right of the applicants in this case, to petition for a new trial, notwithstanding their failure properly to bring up their exceptions.

It becomes necessary, then, to consider the merits of this petition for a new trial, and to examine the grounds upon which it is claimed. The proceeding in this case is for the enforcement of a lien, alleged to have been created by the parties upon the premises described in the original petition.

The first question raised is, whether the estate upon which the lien is claimed is sufficiently described. Of this we have no question. The property is described as "The Manchester Print Works," formerly called the "Arnoldville Print Works," bounding them particularly, and as containing "six and a quarter acres," &c. There is no difficulty in ascertaining what the subject is in which the petitioners claim a lien. It was objected, that there is no particular description of the interest or estate which the respondents had in the premises described. This does not seem to be required by the statute regulating these proceedings. The act requires only, that the petitioners should give notice,—name the individuals against whose interest in the premises they intend the lien should be enforced, but does not require any particular statement of what that interest is, whether for life, for years, or in fee.

The judge held, also, that upon the construction of the written contract submitted by the petitioners, which it was the sole province of the judge to construe, the contract for the work done by them, and under which it was done, was the sole contract of Patterson, one of the respondents; and as the petitioners claimed a lien for work done under the joint contract of Schroeder and Patterson, they had not submitted any proof of such work as alleged, and so had entirely failed

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to support their allegation. If the judge was right in this, the petitioners were properly nonsuited. Every party is bound to prove every substantial allegation made by him. The petitioners set forth, and allege a lien created by a joint contract of two; they prove only the sole contract of one. The debt proven is not the debt alleged. They propose to show a lien for something else than that which is alleged.

Was the judge right in holding, that upon the proper construction of several written contracts, the contract under which the work was done was the sole contract of one only of the respondents? The contract for furnishing the materials and performing the work for which the lien is here claimed, was originally made with the petitioners by Schroeder alone; but by a subsequent contract between them and Schroeder and Patterson, Schroeder was to transfer all his, Schroeder's interest in this contract, all power to claim the fulfilment thereof by the petitioners and all interest in the property to be ceded to Patterson, and to be relieved from all obligation upon it and all liability in relation to it, except a mortgage lien for a certain amount; and Patterson, with the assent of the petitioners, assumed all obligation under the contract, and thereby became substituted to Schroeder in this contract, and Schroeder discharged. There was no evidence offered of any other contract for the performance of the work than that contained in the written agreement referred to, and no evidence of any liability of Schroeder for the work done, as the copartner of Patterson, sufficient for the jury to weigh. The substance of the evidence submitted by the petitioners was, that Schroeder was not a copartner of Patterson at the time of the substitution of the latter for him in the contract with the petitioners; but it was agreed that he was to become a copartner when his debts were settled, which time never arrived.

Although the petition for new trial is properly before us, it must, because it discloses no error in the judge who disposed of the cause below, be dismissed with costs.

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GEORGE HOFFMAN v. REBECCA ANTHONY & others.

The notice of sale under a power in a mortgage, usually required to be advertised by the mortgagee or his assignees in a public newspaper for a certain number of days previous to the sale, is designed to secure the attendance of purchasers of, and a fair price for, the mortgaged estate; and where such a notice was not signed by any one, and gave neither the name of the mortgagor, nor of the mortgagee, nor, correctly, a reference to the page of the volume of Land Records in which the mortgage was recorded, nor even the name of the auctioneer who was employed to sell the estate, it was held to be fatally defective, and, notwithstanding a sale under it, a redemption of the mortgaged estate was decreed to the assignee of the equity; such notice affording to persons who might desire to purchase the estate no means of ascertaining the validity of the title offered to them.

BILL IN EQUITY to redeem two lots of land in Cranston, originally mortgaged, together with two other adjoining lots of land, by James Reynolds and Thomas Parker to Henry Blundell, to secure a promissory note, at three years, of five hundred dollars, of the equity of redemption in which lots the plaintiff was an execution purchaser.

The mortgage, which was dated December 13, 1852, contained a power of sale to Blundell, his heirs, executors, administrators, and assigns, authorizing him or them, in default of payment of said note or annual interest, to sell the lots for the satisfaction of the same, "first giving thirty days' notice of such sale in some one of the public newspapers printed in the city of Providence." In October, 1853, Reynolds and Parker, who held the four lots mortgaged by them as tenants in common, by mutual releases, vested two of the lots in severalty, being numbers 117 and 118 on a plat of part of the Joseph Burgess farm, in Parker, and the other two, numbered 119 and 120 on said plat, in Reynolds, subject to said mortgage; and on the 18th day of March, 1857, Parker released all his interest and equity of redemption in his two lots, numbers 117 and 118, to Sarah K. Reynolds, the wife of James Reynolds. The interest and equity of redemption of Reynolds in the other two lots embraced in the mortgage, being lots 119 and 120 on said plat, was levied upon by two executions, issuing out of the supreme court, obtained against him by creditors of Reynolds, and was, on the 25th day of February, 1858, sold and conveyed to the plaintiff by

the deputy-sheriff charged with the service of said executions. Upon this title, the complainant commenced an action of ejectment against Reynolds, who was in possession of the two lots, and at the September term of the supreme court obtained judgment for possession. The mortgage came by mesne assignments to the defendant Thomas E. Anthony, who claimed to hold the same as security for the balance due thereon, amounting, as the bill charged, only to about three hundred dollars. On the 11th day of December, 1857, after Anthony had contracted with the East Greenwich Institution for Savings, the then holders of the mortgage, to purchase the same from them, but before he had received an assignment of the mortgage, he advertised the four lots embraced in the mortgage for sale under the power, in the "Rhode Island Weekly Tribune," a newspaper printed in Providence; and having received an assignment of the mortgage on the 6th or 7th day of January, 1859, he sold, on the 12th day of January, 1859, the mortgaged property at auction, for the sum of \$320, — he bidding off the same in the name of his sister, the defendant, Rebecca Anthony, and giving her a deed thereof. The notice of sale, advertised as above by Anthony, was as follows: —

" Mortgage's Sale.

" Will be sold at public auction, on the 12th day of January, 1859, on the premises, by virtue of a power of sale contained in a deed of mortgage, made and executed on the 13th day of December, 1852, and recorded in book 27, page 25, of the records of deeds, &c., in the town of Cranston, the conditions of which have been broken, the following described real estate situated in said Cranston, being lots laid out and described as Nos. 117, 118, 119, 120, on a plat of part of the Joseph Burgess farm, belonging to Edward R. Mitchell, surveyed and platted by Atwater & Schubarth, and recorded in book No. 16, page 575, of the records of deeds, &c., in Cranston, with the buildings and improvements thereon. Sale to commence at ten o'clock."

The bill charged that the sale was advertised by collusion between James Reynolds and Anthony, before the latter had become the owner of the mortgage, in a paper of limited circulation, — so that the plaintiff never heard of the sale until the

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27th day of January, 1859, fifteen days after it had taken place, when he was casually informed of it; that the reference to the book and page of the Cranston records, in the notice, for the record of said mortgage, is erroneous; that the sale was made on the premises in Cranston, by an auctioneer appointed by the city of Providence; no person beside the auctioneer being present but James Reynolds, Thomas E. Anthony, and a person unknown to the complainant; that no posters were put up or other notice given of the sale than the above advertisement; that the lots were sold together, and bid off by Anthony in the name of his sister Rebecca, for \$320, when they were well worth and would have brought, at a sale fairly advertised and conducted, a thousand dollars; and that the sale was collusively contrived and carried on by the defendants, Reynolds and Anthony, for the purpose of cutting off the claim of the complainant to lots Nos. 119 and 120, embraced in said mortgage.

The answer of the defendants admitted the statement of the title on both sides, as made in the bill,—that the sale was advertised by Anthony before he had obtained a transfer of the mortgage, but after he had contracted for it, and with the assent of the East Greenwich Institution for Savings, the then holder of the mortgage; that the notice of sale was as above set forth, and erroneous as to the page of the book of records in which the mortgage was recorded; that the sale was made by a Providence auctioneer, but under the direction of a Cranston auctioneer, who was present at the sale; that the lots were bought at the sale by Rebecca Anthony for \$320, being less than their value; one Rice bidding for her, but the deed being executed to her; that she bought at the request of Sarah Reynolds, the wife of James Reynolds, but for herself; that she paid no money to her brother, but gave to him her negotiable promissory note, which has since been taken up; but the answer denied all collusion for the purpose of defeating the plaintiff's equity of redemption, and all fraud whatsoever, alleging that the sale was fairly conducted, and was made for the sole purpose of enabling Anthony, the holder of the mortgage, to obtain out of the mortgaged property what he had paid for the mortgage.

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Depositions were taken and read on both sides, bearing upon the allegations of the bill and answer, but as they do not touch the point upon which the case was decided, it is needless to set forth their contents or substance.

James Tillinghast, for complainant.

1. The sale is ineffectual to cut off the complainant's right of redemption,—because in the advertisement neither mortgagor nor mortgagee, nor any party connected with the mortgage, is named, and the only means given by which to ascertain under what mortgage the sale is to be made, is the reference to its record,—and this is not correct. This is admitted by the answer. Compare per *Wing, J.*, in 1 Mann. (Mich.) 342.

2. Because the advertisement was insufficient, being made by Anthony when he had no title whatever to the mortgage, and while the title was in the Institution for Savings. *Cohoes v. Goss*, 13 Barb. 137; *Miles v. Bransford*, 1 Mann. (Mich.) 338.

3. Because the promise by Kenyon, as treasurer of the Institution for Savings, to the complainant, to inform him before anything was done with the mortgage, rendered any attempted foreclosure without notice to the complainant entirely ineffectual to bar the complainant's right of redemption. See *Hall v. Cushman*, 14 N. Hamp. 171.

4. Because the sale was made in Cranston, by an auctioneer not authorized to sell there. An auctioneer cannot delegate his authority. *Commonwealth v. Harnden*, 19 Pick. 482; *Stone v. The State*, 12 Miss. 400, (11 U. S. Dig. 332, 333, §§ 56, 57, 58.) Compare Rev. Stats. ch. 117, pp. 270, &c., particularly §§ 10 to 23. It is evident here that in the language of *Morton, J.*, in 19 Pick. 484, *supra*, Doyle did not make this sale as the mere servant or clerk of Moore, but “made the sale himself, having obtained permission for the purpose, as a cover by means of which to evade the provisions of the statute.”

5. Because the sale was otherwise objectionable. Although the answer contains formal denials of collusion and intention to cut off the complainant's rights, yet enough appears, chiefly from the statements of the answer itself, to show the real transaction, viz.: that the mortgagor, mortgagee, and purchaser, are brothers and sisters and the sale was entirely a *family* matter.

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They knew of the complainant's title, and that he had applied to the bank for this very mortgage to protect himself, and *because they knew this* they procured the respondent, Thomas E. Anthony, to take this mortgage as a mere conduit through whom to make the sale, the purchase being arranged beforehand. Though knowing the complainant's interest in the matter, no notice is given him of the intended sale. It is advertised in the "Weekly Tribune," where not one in a thousand would see it, and no posters put out. Reynolds himself had the whole charge of the business. No names are mentioned in the advertisement; no one was present at the sale but the auctioneer, the mortgagor, mortgagee, and the person employed by them to bid it off (bid it *in*, we submit.) It is put up and sold at the request either of Reynolds or Anthony in an unusual way, and struck off (or bid in?) for just the amount of the mortgage, and at about or less than one third its value; and no money paid at the time.

Thurston & Ripley, for the respondents.

1. The answer denies fraud or collusion, and all the facts admitted or proved are reconcilable with good faith, and if so, the complaint must fail. 1 Story's Equity, 222, § 190; *Rogers v. Cruger*, 7 Johns. 605.

2. If this is a defective execution of the power contained in the mortgage deed, it is such a defect as a court of equity will supply. *Bur v. Hatch*, 3 Hamm. (Ohio) Rep. 529; *Russ. & Myl.* 418; *Schenck v. Ellingwood*, 3 Edw. Ch. 175; *Beulram v. Rine*, 2 Call. 387; 1 Story's Equity, § 176; Sugden on Powers, ch. 6, (4th ed.) 353, 358. The agreement for the transfer of the mortgage was made with the East Greenwich Institution for Savings before the advertisement was inserted. The treasurer of said institution had authority to make the transfer to Thomas E. Anthony.

3. The "Weekly Tribune" is a paper of average circulation. The advertisement was substantially correct under the power of sale, and the description was such as that no one could be deceived. No particular form of notice of a sale is prescribed by law, under a deed of trust; it is sufficient if the description of the land is reasonably certain, so as to inform the public of the

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property to be sold. *Newman v. Jackson*, 12 Wheaton, 570; 7 Ib. 363; 2 Kent, 710; *Calcraft v. Roebuck*, 1 Vesey, jr., 221; *Dyer v. Hargrave*, 10 Vesey, 505.

4. The lots were sold under the authority and by the direction of Silas Moore, an auctioneer of the town of Cranston. An auctioneer may employ another to sell under his control. *Commonwealth v. Harnden*, 19 Pick. 482.

5. In a mortgagee's sale, inadequacy of consideration is not enough to reopen it. *Tripp v. Cook*, 24 Wendell, 143; *Osgood v. Franklin*, 14 Johns. 527; 1 Madd. Chan. 98; Select Chan. Cas. 7; 10 Vesey, 292; 2 Atk. 251; 2 Bro. Ch. Cases, 179. Besides, it was upon the evidence an average sale for a mortgagee's sale.

6. The respondent is a *bonâ fide* purchaser, who has as high a claim to assistance as any other person can have. 1 Story's Equity, § 108. If the equities are equal, a court of equity is silent and passive. Story's Equity, § 176.

BRAYTON, J. The plaintiff in this bill claims the right to redeem the premises described therein from the mortgage execution by James Reynolds and Thomas Parker, on the 13th day of December, 1852, to Henry Blundell, which mortgage, the bill charges, came to the defendant, Thomas E. Anthony, by various mesne assignments, and that the said mortgage is still a subsisting mortgage upon the estates. The bill, anticipating the defence to be set up to his claim for redemption, that the mortgage had been foreclosed by sale under the power contained in the mortgage, and to show that the power had not been executed, at least so executed as legally to vest the estate in the purchaser to whom it was struck off at the auction sale, sets out, among other grounds of objection to the validity of the sale made by the said Anthony, the assignee of the mortgage, that the advertisement, caused to be published by the said Anthony in the public newspaper, is not signed, and does not contain the name of any party connected with the mortgage; and charges, that the reference in said notice to the place where said mortgage is recorded, is not correct, the mortgage not being there recorded. The answer admits that this was the notice given, and that it was erroneous in the particulars charged; that although it stated

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that the mortgage was recorded at page 25 of Book No. 27, in Cranston, it was not there recorded, but was recorded on page 325 of that book. Now the plaintiff claims that such a notice as here appears to have been given, is not sufficient to warrant a sale; that it is not a fair compliance with the condition imposed upon the power of sale, to give thirty days' public notice.

The power in this case was by the mortgagor vested in the mortgagee, if the mortgagor should make default in payment at the times appointed, to sell the estate, or so much as might be necessary to discharge the debt upon condition, but that he should give public notice of such sale for thirty days. This power is annexed to the estate of the mortgagee; and every assignee, by virtue of the assignment to him thereof, is clothed with this power, and upon the like condition of notice. The mortgagee, so long as he held the estate in mortgage, and every successive assignee while he held it, became a trustee, therefore, with a power to sell and appropriate to himself so much only as might be necessary to discharge the debt due from the mortgagor. He was to sell no more than might be reasonably necessary to discharge the debt. If he sold more from any necessity, he was to hold the balance above the mortgage debt for the mortgagor, and if any assets remained unsold, it remained to the mortgagor.

The mortgagor did not require and had not provided, that before making sale of the estate or any part thereof, any notice should be given to him of such intended sale. The only notice provided for was that by advertisement in a public newspaper, and which was intended to invite purchasers. This was its great and only purpose; and as the mortgagor had provided no notice to himself upon which he could give a wider circulation to the advertisement, was of the utmost importance to him. He had a deep interest in having such notice given as would be likely to attract purchasers who would be willing to give a fair price for the estate. This being the purpose of the notice, it imposed a duty upon the assignee to see that the notice was given, such as would reasonably accomplish the end designed. This duty is expressed by the Chancellor in the case of *Matthie v. Edwards*, 33 Eng. Chan. R. 465, in reference to a notice under a like

power, in this language: "A mortgagee having a power of sale cannot, as between himself and the mortgagor, exercise it in a manner merely arbitrary, but is bound to exercise some discretion not to throw away the property, but to act in a business-like manner with a view to obtain as large a price as may fairly and reasonably, with due diligence and attention, be under the circumstances attainable."

The same view, as to the duty of the mortgagee in giving notice, is expressed in *Burnet v. Deniston*, 5 Johns. Ch. 35; *Longworth v. Butler*, 3 Ill. 32. This duty, as it seems to us, is not performed by the notice published in the present case. The advertisement professes to give notice that at a certain time and place these lots of land, which are sufficiently described to inform purchasers what is proposed to be sold, will be sold by somebody under a certain power which may be found in the records of Cranston, in a certain place there. This reference to the records is the only source pointed out by the notice of any information as to the terms of the power, or of the conditions upon which it might be exercised; and when an inquirer goes there, no such record and no such information is to be found. Whether there is any such power he has no means to ascertain. It is not even stated who made the mortgage or to whom it was made. Had this been stated, he might have found the deed somewhere on the records; but without it, he is only to search for a mortgage of lots 117, &c. made by somebody. The record in fact utterly fails to furnish him with any information. He proposes to inquire of the person who advertises the sale. But who is he? The notice does not state this. He cannot inquire of the mortgagor or of the mortgagee, for he has no notice who they are. As a last resort it might occur to him to inquire of the auctioneer, but on looking at the advertisement he finds that it is not disclosed who is to conduct the auction sale. All that he can know is, that certain lots of land, which he can view, are proposed to be sold by somebody, not named, under a power from some other person, not named. Whether there exists any such power, or whether the contingency has arisen upon which it is to be exercised, or what the contingency is, he cannot know from any source of information given

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him. He has no means to form an opinion even whether anything could be sold, and whether it would be worth his while to attend at the time and place notified. Few purchasers, probably, would think it was. Being pointed to the records for the terms of the power, they should have the means of examining, as they would desire to do, before bidding.

It is no matter of wonder that with such a notice as this no other persons attended this sale, as the evidence shows they did not, than such as derived their information from other sources than this advertisement,—none but such as were specially invited to attend, viz: the auctioneer, the holder of the mortgage, one of the original mortgagors having then no title, and one other person specially requested to bid for the defendant Rebecca Anthony. Nor is it strange that the estate should, under the circumstances, have been struck off for one third of its fair value. Such a notice would be likely to produce such a result, or at least was not adapted to produce any other. In giving such notice it cannot with propriety be said that the assignee, in the exercise of the power and trust with which he was clothed, acted in a business-like manner with a view to obtain as large a price as might reasonably be obtained under the circumstances with due diligence and attention on his part, or in common fairness towards his cestui que trust.

It must be declared that the plaintiff is in this case entitled to redeem, that the said mortgage is not foreclosed, and the case must be referred to a master to ascertain the amount due upon the mortgage.

STATE (on the complaint of EDWARD P. KNOWLES) v. MARTIN C. POLLARD.

The ordinance passed by the town council of North Providence, on the fourth day of March, 1860, entitled "An ordinance for the government and regulation of the police of the town of North Providence," although not contained in the revised ordinances of said town adopted by the town council of North Providence in 1868, is not repealed thereby, because "not repugnant to the provisions of the ordinances" contained therein, and so not within the repealing clause of said revision.

Nor is the above ordinance repealed by the fourth section of the act of the general assembly

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bly, passed at the January session, 1852, entitled "An act authorizing the town of North Providence to establish bridewells, and for other purposes."

COMPLAINT and warrant against the defendant, charging, that at North Providence, on the first day of August, 1859, by loud shouting and obscene language in a street of said town, to wit: the street leading by the Treadwell farm, so called, and other public places in said town, he annoyed the peaceable inhabitants of said town, and the passengers in said street, against an ordinance of said town, in such case made and provided, and against the peace, &c.

This, and several other complaints for the same offence at other times, were made by the same prosecutor against the defendant, upon which warrants having been issued by William Earle, Esq. a justice of the peace for the town of North Providence, and the defendant having been found guilty, he brought the same by appeal to this court. The appeals were tried, at this term, before Mr. Justice Bosworth, sitting with a jury; and verdicts were taken against the defendant, subject to the opinion of the court upon the question whether the ordinance, under which the defendant was prosecuted, was in force at the time of his alleged offences against it.

The ordinance was passed by the town council of North Providence, on the 4th day of March, 1850, and was as follows:—

"An Ordinance, for the government and regulation of the police of the town of North Providence.

It is ordered by the town council of said town as follows:—

Sect. 1. Every person who shall be convicted of riotous or disorderly conduct in the streets, highways, or other public places in said town, committed by obstructing in a disorderly manner any street or sidewalk, or by loud shouting or obscene language, to the annoyance of any of the peaceable inhabitants of said town or passengers in any street or highway of the same, on conviction thereof before any justice of the peace or competent court, shall forfeit and pay as a fine not less than one dollar nor more than twenty dollars to and for the use of the town, and in default of paying the same shall be committed to the bridewell in this town for not more than twenty-four hours, or to the county jail for not more than ten days.

Sect. 2. Henry M. Tucker, James H. Angell, and John S. Dispeau are hereby appointed officers to complain and prosecute for violations of this ordinance.

Ordered, That the clerk cause printed copies of this Ordinance to be posted up in public places in this town."

At the January session of the General Assembly, 1852, an act was passed, entitled, "An act authorizing the town of North Providence to establish bridewells, and for other purposes," by the 4th section of which it was enacted :

"Sect. 4. Any person who shall be found intoxicated or quarrelling, or revelling, or wantonly making a false alarm or cry of fire, or otherwise behaving in a disorderly or indecent manner, to the disturbance of the orderly people of said town, in any public street, lane, public building, or other public place, wharf or common, in said town, or shall aid, incite or encourage the same to be done, shall, on conviction thereof, be sentenced to pay a fine not exceeding five dollars, or to be imprisoned not exceeding ten days, in one of the bridewells of said town established pursuant to this act, at the discretion of the justice having cognizance of the offence, and to pay all costs of prosecution and conviction ; and in default of paying such fine and costs, to stand committed to such bridewell until such sentence be performed in all its parts ; *Provided*, that such person shall not be kept in imprisonment for a longer period than ten days for any one default, except as provided in the tenth section of this act."

The 14th section of this act provided, that "Every complaint for any offence against this act shall be commenced within ten days after the commission thereof, and not after."

In 1858, the town council of North Providence revised, digested, and published in pamphlet form, the ordinances of the town passed by the town council ; the pamphlet containing also the several acts of the General Assembly specially relating to the police of the town, and the ordinances of the town passed in town-meeting. Amongst the ordinances passed by the town council which were then revised and digested, was one "in relation to sidewalks, lanes, crosswalks, and passageways," the first section of which was as follows :—

" Sect. 1. All persons who shall obstruct any sidewalk, passage-way, crosswalk, or lane, in the village of Pawtucket, or other compact part of said town, by congregating or standing therein, or crowding the same, to the annoyance or disturbance of the peaceable inhabitants thereof, or passengers in or through such lane, passage-way, crosswalk or sidewalk, shall forfeit and pay a fine of not less than one dollar, nor more than twenty dollars."

The first of the two concluding ordinances in this revision, amongst other things, provided, "that all complaints under these ordinances shall be made within ten days after the commission of the offence;" and the concluding ordinance in the revision repealed "all ordinances heretofore passed by said town council, which are repugnant to the provisions of the abovenamed ordinances." The ordinance under which the defendant was prosecuted was not in the revision, and was, as contended, one of the ordinances referred to in this provision for repeal.

A motion was now made by the defendant to set aside the verdicts against him, upon the ground that the ordinance under which he had been convicted had been repealed.

Clarke, for the prosecutor.

Thurston, for the defendant.

BOSWORTH, J. This is a motion to set aside a verdict of the jury, on the ground, that the ordinance of the town council of North Providence, under which the complaint was made, has been repealed.

The ordinance was passed by the town council of North Providence on the 4th day of March, A. D. 1850, and is entitled, "An ordinance for the government and regulation of the police of the town of North Providence," and provides, that "every person who shall be convicted of riotous or disorderly conduct in the streets or highways or other public places in said town, by obstructing in a disorderly manner any street or sidewalk, or by loud shouting, or obscene language, to the annoyance of any of the peaceable inhabitants of said town or passengers in any street or highway of the same, shall, upon conviction thereof, pay a fine of not less than one, nor more than twenty dollars,

and in default of paying the fine, shall be committed to the bridewell or the county jail."

The complaint in this case is made under, and comes within the provisions of this ordinance. Subsequently to the passage of this ordinance, it seems that the town council passed a new by-law, establishing the ordinances of the town of North Providence, and prescribing the time when they should go into effect. By the provisions of this new by-law, certain enumerated ordinances are declared to be the ordinances of the town; all such of them as are new ordinances, and such of them as are amendments or alterations of previous ordinances to go into operation on the 15th day of December, 1858. The ordinance under which this complaint is made is not among those enumerated. Among the ordinances established by the by-law establishing ordinances, is an ordinance prescribing the mode of prosecuting for violations of the ordinances of the town, in which it is provided, that all complaints under these ordinances shall be made within ten days after the commission of the offence; and another, by which all ordinances which are repugnant to the provisions of the aforementioned ordinances are declared to be repealed from and after the 15th day of December, 1850. The provision limiting the time within which prosecutions are to be commenced, is, by express language, applied to the "aforegoing ordinances;" *i. e.* those established by the by-law establishing certain ordinances enumerated by their titles, among which the ordinance under which this complaint is made is not found. The repealing act is of all ordinances which are repugnant to the provisions of the aforementioned ordinances. The ordinance under which this complaint is made is not repugnant, and therefore is not repealed by that act.

There is one other ground on which it is contended that the ordinance, under which this complaint is made, is inoperative; and that is, that in the fourth section of the act of the General Assembly, entitled, "An act authorizing the town of North Providence to establish bridewells and for other purposes," it is enacted, that "Any person who shall be found intoxicated, or quarrelling or revelling, or wantonly making a false alarm or cry of fire, or otherwise behaving in a disorderly or indecent

manner, to the disturbance of the orderly people of said town, in any public street, lane, public building, or other public place, wharf, or common, in said town, or shall aid, incite or encourage the same to be done, shall, on conviction thereof, be sentenced to pay a fine not exceeding five dollars, or be imprisoned not exceeding ten days, &c." This act was passed in the year 1852, subsequently to the passage of the town ordinance under which the complaint was made. If it embraces the same subject-matter with the ordinance, it is contended, that the ordinance is superseded and rendered inoperative. It would be incompatible that a town ordinance, with one penalty against an offence, should coexist with a public law, having a different penalty against the same offence; and the Revised Statutes, ch. 34, p. 102, provides, in sec. 18, that no ordinance or regulation whatever made by a town council, shall impose, or at any time be construed to continue to impose, any penalty for the commission or omission of any act punishable as a crime, misdemeanor, or offence, by the statute law of the state.

Upon a comparison of the ordinance under which this complaint is made, with the statute by which it is contended that it is superseded, we find a total difference of phraseology. The *ordinance* is against riotous or disorderly conduct in the streets, committed by obstructing any street or sidewalk, or by loud shouting or obscene language, to the annoyance of any of the peaceable inhabitants or passengers in said highways or streets; the *statute* is against drunkenness, revelling, quarrelling, or raising the false alarm of fire, or otherwise behaving in an indecent or disorderly manner to the disturbance of the orderly people of said town. One is against annoyance to any inhabitant *or passenger*; the other is against the disturbance of the orderly people of said *town*. One aims to protect inhabitants or passengers against private annoyance; the other to secure the orderly people against public disturbance. So we think they well may stand together, one imposing a penalty for one offence, the other for another.

The motion to set aside the verdicts upon these complaints must, therefore, be overruled, and the defendant called for sentence.

6	296
7	562
13	499
13	638
6	296
18	394
6	296
21	359

BENJAMIN B. THURSTON v. HORACE THURSTON & others.

A devise of a farm to B. B. T. "in special trust and confidence for my son H. T., and after him, in fee to his heirs;" with an order to the trustee to pay to H. T. the annual rent of the farm, "and in the event of his decease without issue," the farm to "revert equally to all the other surviving children of the testatrix," gives to H. T. an *equitable* estate for life, and to his heirs of the body a *legal* remainder in fee; the rule in Shelley's case not applying on account of the different qualities of the two estates.

In such case the necessary repairs of the buildings upon the farm are a charge upon the estate of H. T. the life-tenant, during its continuance; and the trustee is justified in applying, from time to time, such portion of the rent as may be necessary to make such repairs. The trustee has, however, no power to sell the interest of the life-tenant in any portion of the farm, to make such repairs, nor will a court of equity authorize him to do so; the life-tenant being *sei juris*, and there being no restraint upon his alienation of his estate.

A court of equity has no jurisdiction, in such case, upon the application of the trustee of H. T. to authorize him to sell for such repairs the interest of the minor children of H. T. in any portion of the farm; the trust not extending to their estate, and the modern doctrine being, even in case of a trust for an infant, that where no duty or charge is incumbent upon the inheritance of an infant, the court has no power to authorize it to be sold by the trustee merely upon the ground of some benefit which may accrue to the infant therefrom.

In Rhode Island, by Rev. Stats. ch. 151, sect. 10, the power to authorize the sale of the real estate of infants, for any proper purpose, is conferred upon the courts of probate; and in cases within the spirit, though not within the letter of the statute, and in similar cases, the General Assembly is constitutionally competent to give to guardians and trustees special authority to sell the real estate of their wards and cestuis for proper purposes; this being the exercise of a legislative and not of a judicial power.

THIS was an amicable bill filed by a trustee under the will of Sarah Thurston, late of Hopkinton, deceased, for leave to sell a portion of the trust estate for, or to apply the rents and profits thereof to, the repair of the buildings thereon, and for instructions.

From the bill and answers, upon which the case was submitted, it appeared that the testatrix, amongst other things, by her last will and testament, devised the Babcock farm, so called, in Hopkinton, containing about two hundred and ninety acres, and of the value of about three thousand dollars, and having upon it a dwelling-house and other buildings, to the complainant, in trust, in the following words:—

"Item. I give, devise, and bequeath to my son Benjamin B. Thurston, in special trust and confidence for my son Horace

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Thurston, the Babcock farm, so called, which I inherited from my father, and after him, in fee to his heirs; the annual rent of which I do hereby order and direct my said trustee to pay to my son Horace Thurston, and in the event of his decease without issue, it is my will that said farm shall revert equally to all my other surviving children."

The buildings on said farm were greatly out of repair and were falling rapidly into decay; and the *cestui que trust*, Horace Thurston, having no means with which to repair them independent of the trust estate, and requiring the rents and profits of it for his support, this bill was filed by the trustee against Horace Thurston and his minor children, for leave to sell a portion of it to make the necessary repairs, and for directions as to his power and duty in the premises.

Thurston, for the parties.

The question presented by the bill and answers is this:—

Will a court of equity aid a trustee in disposing of a portion of the trust property for the purpose of making the residue of the estate of some productive value to those who are interested in the remainder, when it satisfactorily appears to the court that unless this relief is afforded the estate of the minor children must be greatly impoverished?

Previous to the decision by this court of the case of *Taylor v. Place*, (4 R. I. Rep. 324,) the General Assembly, acting as a court of chancery, entertained petitions of this character on the part of trustees. An application in behalf of Asa Potter, under this same will, was granted by the legislature at the May session, A. D. 1851, (Schedule of 1851, page 44,) and instances of relief in similar cases have been in our history so numerous, and the practice is so familiar to the court, that a more particular citation of instances is unnecessary. In fact, this very complainant petitioned at the last session of the assembly for the very relief which he now seeks, but was refused, not on account of any doubt in the mind of the assembly as to the propriety of granting the petition, but in consequence of a dislike to interfere in view of the decision in *Taylor v. Place*, above referred to.

The propriety of the application, as the only means of secur-

ing to the minor children interested in the premises the full value of their estate, need not be argued. The legislature, as has been already stated, admitted the propriety of some relief, and the town council of the town of Hopkinton indorsed on the petition their full recommendation. The bill and answers also set forth all the necessary facts which the court would desire to know in deciding upon the merits of the case.

Has this court the power to afford assistance to the trustee ?

On this point it is submitted, that the exercise by the legislature of the power to change investments of trust property, from the earliest period of our history down to the time of the decision above referred to, is in itself the best evidence that such a power can be in this state properly exercised by the appropriate tribunal.

Now, certainly, although it is undeniably true that such a power, and in fact no other judicial authority could with propriety be exercised by the legislature after the adoption of the constitution, yet it was intended that the power which formerly belonged to the legislature should be transferred to the judicial department of the government. In determining therefore any question as to chancery jurisdiction in this state, it is proper to inquire into the practice of the assembly on similar questions before the adoption of the constitution ; and if that body afforded relief, then the judiciary, as a necessary inference, has the same power now. To deny this doctrine, would be to assert that the charter government was better suited to the wants of the citizen than the present constitution.

Mr. Justice Story (Eq. Juria. § 978) says, where the *cestui que trust* is of age, or *sui juris*, the trustee has no right, unless express power is given, to change the nature of the estate, as by converting land into money or money into land, so as to bind the *cestui que trust*. But where the *cestui que trust* is not of age, or *sui juris*, it is frequently necessary to his interests that the trustee should possess the power, and in case his interests require the conversion, the acts of the trustee, *bonâ fide* done for such purpose, seem to be justifiable.

2 Fonbl. Eq. B. 2, ch. 7, § 1, note a, says, in addition to the

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doctrine stated by Mr. Justice Story, "the true criterion is, whether the interests of the *cestui que trust* required the conversion;" and *vide* the cases there cited.

Now the present application comes within the above rule: the *cestuis que trust* are minor children, unable either in law or from understanding to act for themselves, and unless their best interests can be aided by a sale of a portion of the estate for the benefit of the residue, the object of the testator will be defeated.

The complainant asks that he may be authorized to make sale of so much of the estate as will amount to the sum of seven hundred dollars, the proceeds to be expended in restoring the buildings on the residue, he to give bond to this court for the faithful application of the proceeds of sale, and the sale, as well as the application of the money (if the court see fit), to be under the direction, and with the advice, of the town council of the town of Hopkinton. If the court dislike to order a sale of any part of the farm, then the complainant would suggest that he have authority to give a mortgage security upon the farm to any person who will advance the money for the purposes required. In the matter of Kane, 2 Barb. Ch. R. 375; *Rice v. Tonnele & others*, 4 Sandf. Ch. R. 568; *In re Burke*, Ib. 617; *Hayward v. Cuthbert*, 4 Dessau. 440; *In re Bostwick*, 4 Johns. Ch. R. 100; *Tery v. Norcom*, 2 Iredell, Eq. 354; *Withers v. Hickman*, 6 B. Monr. 292; *Newport v. Cook*, 2 Ashmead, 332; *McDowell v. Caldwell*, 2 McCord, 43; *Williamson v. Berry*, 8 Howard, 495, 531, Nelson, J.; *Buckworth v. Buckworth*, 1 Cox, 80; *Franklin v. Green*, 2 Vern. 137; *Harvey v. Harvey*, 2 P. Wms. 21; *Fairman v. Green*, 5 Ves. 44; *Greenwell v. Greenwell*, 10 Ib. 194, 195; *Fendall v. Nash*, Ib. 197, n. a.; *Ex parte Kebble*, 11 Ib. 604; *Marshall v. Holloway*, 2 Swanst. 436; *Turner v. Turner*, 4 Sim. 430.

AMES, C. J. The bill assumes, and we think correctly, that under the will of his mother, Horace Thurston is tenant for life of the Babcock farm in Hopkinton, and that his children or issue are entitled therein to a remainder in fee. His estate is an equitable one; the order to pay over the rents to him requiring to its performance the legal estate to be in the trus-

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tee; but as the order does not apply to the heirs or issue of Horace, there is nothing to prevent the subsequent limitation from being executed in them. *Shapland v. Smith*, 1 Brown, Ch. C. 74; *Doe d. Leicester v. Briggs*, 2 Taunt. 109; *Brown v. Ramsden*, 3 Moo. 612; *Tenny d. Gibbs v. Moody*, 3 Bingh. 3; *Doe d. Greatrex v. Homfray*, 6 Ad. & Ell. 206. The estate of Horace being equitable, and of his heirs, who are to take the fee after him, being legal, the rule in Shelley's case does not apply; and the latter take contingently as purchasers. Fearn on Contingent Rem. ch. 1, sect. 5, art. 9, p. 52. The limitation over upon the death of Horace without issue, indicates that by the term "heirs," the testatrix intended "heirs of the body" of Horace.

Horace Thurston being then tenant for life of the farm in question, the expense of keeping the buildings thereon in tenantable repair, must, as between him and those entitled in remainder, be a charge upon his estate. *Bostock v. Blakeney*, 2. Bro Ch. C. 653; *Hibbert v. Cooke*, 1 S. & Stu. 552; *Nairn v. Majoribanks*, 3 Russ. 582; *Caldicott v. Brown*, 2 Hare, 144. If we construe the trust to authorize the complainant to manage and let the property, and to pay over the annual rents as they accrue to the life tenant, the complainant would be justified in applying from time to time so much of them to such repairs as would be necessary to the performance of this duty by the life tenant. No power of sale having been conferred upon the complainant as trustee, he cannot sell the estate of his *cestui*, even to make the most necessary repairs; and, as the *cestui* is *sui juris*, and there is no restraint against his alienating his estate, a court of equity would not, if for no other reason, authorize the trustee to do what his *cestui* himself could do, if his estate were not worth retaining, or he was not in a situation to bear the burdens which it imposed.

It may possibly be, that although it is no part of the duty of the infant defendants, as contingently entitled to a remainder in fee in this farm, to pay for necessary repairs upon the buildings on it during the pendency of the life-estate, yet that rather than the buildings should fall into decay, it would be a benefit to them, that a portion of the farm should be sold

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to enable the making of such repairs. What jurisdiction, however, has this court to authorize the trustee of their father's life estate to sell their interest, to which his trust does not extend, for such a purpose? What right has the court, calculating remote and contingent advantages to them, to convert their property, in order to apply its proceeds to repairs which are incumbent upon the estate of another, although that other may be their father?

Even where the trustee of the real estate of an infant, not empowered to sell, applies to the court for leave to sell it, upon the ground of its being for the infant's benefit that it should be converted for better investment, although there is some contrariety of decision, the best approved doctrine would seem to be, that the court has no jurisdiction to authorize such a conversion. In *Taylor v. Philips*, 2 Ves. Senior, 23, Lord Hardwicke is reported to have said, that "there is no instance of this court's binding the inheritance of an infant by any discretionary act of the court. As to personal things, it has been done; but never as to the inheritance; for that would be taking on the court a legislative authority, doing that which is properly the subject of a private bill." Indeed, whatever doubts may have been entertained on the subject formerly, the modern doctrine clearly is, that where a trust exists, the degree of authority, as well as the manner of its exercise, depends on the terms of the instrument creating it. In other cases the court is thrown on its inherent jurisdiction, and has authority to manage the estate during minority, and to apply its proceeds to the infant's benefit; but there is no inherent power to dispose of or alter the estate itself; except in cases of election and partition, where the disposition is demandable as of right by other parties, and of the devolution on an infant of a mortgaged estate, where a sale is the only protection against foreclosure. *Simson v. Jones*, 2 Russ. & Myln. 365; *Calvert v. Godfrey*, 6 Beav. 97; *Peto v. Gardner*, 2 Y. & Col. 312; *Garmstone v. Gaunt*, 1 Coly. 577; *Adams's Equity*, 284, 285; *Williamson et al. v. Berry*, 8 Howard, 537, 554, 555, 586; see, however, *Inwood v. Twyne*, Ambl. 417; *Terry v. Terry*, Prec. Ch. 273; *Matter of Salisbury*, 3 Johns. Ch. R. 347; *Huger v. Huger*, 3 Dessaus. 18;

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Stapleton v. Langstaff, 1b. 22, denied in *Rogers v. Dill*, 6 Hill, 615; and see *Williams's case*, 3 Bland, 186.

In this state the power to authorize the mortgage or sale by guardians of the real estate of infants, "to pay their debts, the expenses of supporting them or their families, or for any other proper purpose whatever, including the making of a better or more advantageous investment, and the settlement of their estates with incidental charges," is, by statute, confided to the courts of probate; Rev. Stats. ch. 151, sect. 10; and similar statutes are to be found in most of the states of the Union. Hill on Trustees, 396, n. 1. If the purpose for which the sale of their property is asked be a proper one, the language of this statute is certainly broad enough to include the case of the infant defendants presented by this bill; a guardian being first appointed and qualified to apply for them to a court of probate. Rev. Stats. ch. 138, sect. 6. If a case should arise within the spirit, though not within the letter of such, or a similar, statute, a special authority to a trustee to convert the real estate of his infant, lunatic or otherwise incapable *cestui*, would seem to partake, as intimated by this court in *Taylor v. Place*, 4 R. I. Rep. 332-334, more of a legislative than of a judicial character, and would be, having been long exercised and not prohibited by the constitution, within the constitutional competence of the General Assembly. *Watkins v. Holman et al.* 16 Pet. 25; *Davis v. Johannot*, 7 Met. 388; *Snowhill v. Snowhill*, 2 Green's Ch. R. 20; *Norris v. Clymer*, 2 Barr, 277; *Spotswood v. Pendleton*, 4 Call, 514; *Dorley v. Gilbert*, 11 Gill. & Johns. 87.

With these instructions, our office is performed by dismissing this bill; but as the bill has been filed to carry out the views of both the adult parties, with the understanding that no expense with regard to it is in any form to be visited upon the estates of the infants, it must be dismissed without costs.

Whatcheer Bank v. Cushing.

WHATCHEER BANK v. EDWARD J. CUSHING.

An agreement by the holders of a promissory note to release the indorser of it, upon condition of something to be done by the maker, cannot avail the indorser in defence to an action against him on the note, as a release by way of equitable estoppel, unless the condition, in the fair sense of the agreement, has been fully performed by the maker, although the non-performance of the condition is in no way chargeable upon the indorser. Where a bank holding an indorsed note, agreed with the maker and the indorser, that if the former, who had stopped payment, would prefer its claims against him, including the note, in the first class of his assignment, with other banks, it would release the indorser, and the maker put the claims of the bank nominally in the first class of his assignment with other banks, but really postponed them in payment to debts exceeding in amount \$30,000; *Held*, in an action by the bank against the indorser, that the bank was not equitably estopped by the agreement from pursuing the indorser, inasmuch as the condition of the agreement had not been fairly performed by the maker, although without fault on the part of the indorser.

ASSUMPSIT to recover the amount of a promissory note for \$2,000, made by Zachariah Allen, and dated on the 7th day of August, 1858, payable to the order of the defendant, sixty days after date, and indorsed by the defendant for the accommodation of the maker.

The case was submitted to the court, under the general issue, in law and fact; and at the trial it appeared, that in September, 1858, the plaintiffs held, for value, three notes, including the note in suit, for \$2,000 each, made by Zachariah Allen; one indorsed by the defendant, and the other two indorsed by Philip Allen & Sons, — a firm which had failed about a year before; that the maker, Zachariah Allen, having stopped payment, and being about to make a voluntary assignment, in trust, for the benefit of his creditors, came with the defendant to the president of the plaintiff bank, and proposed to him, that if the bank would release the defendant, as indorser of the note now in suit, they should be preferred, in the first class of his assignment, for their whole debt of \$6,000, with the other banks; telling him, that if the bank did not accept the proposition, he should prefer the defendant for the amount of his indorsement, and put the other two notes in a class in the assignment which would probably draw no dividend; that the president of the plaintiff bank told Mr. Allen, that he had no

authority to accept his proposition without authority from the directors, and asked him what he meant by the first class in his assignment? to which the reply was, that it was the first thing preferred in the assignment; whereupon the president told him that he would consult the directors and give an answer the same day, which he did, informing him that he had consulted the directors, and assuring him, that if he would carry out what he proposed, the bank would discharge the defendant as indorser, and shortly after, meeting the defendant, gave him the same conditional assurance; that the next day the defendant called at the plaintiff's banking room, and requested their cashier to release his name from the paper, and insisted that he should do so, but was told by the cashier "that he had no authority to give him the release, and could not do it;" that the next day the president of the bank, meeting the defendant, asked him "why he had called at the bank and asked the cashier to release his name from the paper?" and then told him, "that his name would not be released from the paper, until the assignment was on record, and Mr. Allen has carried out what he had agreed to do." After this, and on the 30th day of September, 1858, Zachariah Allen executed his assignment; the first direction in which, relating to the appropriation by the assignees of the proceeds of the assigned property, was as follows:—

"After paying themselves a reasonable compensation for their services, as well as all counsel fees and attorneys' fees due from me, the expenses of this deed of trust, and all charges attending the management and preservation of the property, and the execution and carrying into effect the trust hereby created,—to pay firstly, out of funds on hand and out of the first proceeds of the stock in said mills and other property hereby assigned, according to the terms of purchase of said stock of cotton as nearly as may be thereto, the balances due on book account to Messrs. King & Glezen and Resolved Waterman for cotton bought of them respectively, since July 14th, 1858, (which are not yet payable,) and the balances due as wages for work, labor, or personal services rendered and actually done by persons in my immediate employ as superintendents,

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clerks, laborers, teamsters or otherwise, at or about the business of said cotton mills, or in the counting-room, said personal services and labor having been mostly paid for in full to the 15th of August, 1858; — then a balance of account due Messrs. William A. Robinson & Co. for oil and starch delivered me since the 11th day of September, 1857, not fully paid for; and the balance due the Providence Dyeing, Bleaching and Calendering Company for bleaching goods delivered me since said 11th day of September, 1857.

“ And whereas, with the purpose and expectation of continuing my business under an extension, I have been induced to renew old obligations by new notes on time to a large amount, given not only for my own paper, but also for my liabilities as indorser and otherwise on the protested paper remaining unpaid of other parties, which said paper is still outstanding as collateral to my said new notes; and whereas, it is my general purpose and intention in this assignment to prefer debts originally and exclusively my own to those which other parties as principals were originally obligated to pay, it is hereby further provided, that after paying in full the debts and claims against me above recapitulated and first described and specified as debts to be paid in full as aforesaid, the residue of the proceeds of all such sales and collections shall be applied to the payment of the following described classes of debts or claims against me, in the order and manner, and on the conditions hereinafter specified, viz.”

The assignment then went on to divide the debts of the assignor, by description of their character or origin into three classes, preferring them in that order, — the holders of the two first of which, as the condition upon which they were to take any benefit under the assignment, were to release the assignor on or before the 31st day of December, 1858; the *third* and last class, as named in the assignment, consisting of all the debts of the assignor not included in the two first classes, or of which, if so included, no release should by that time be executed.

The notes held by the plaintiffs, including the note in suit, were all included, with those held by other banks, in the first

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class, nominally preferred in the assignment, but were, in fact, postponed in payment to debts of the assignor amounting to \$31,415.16, which were, under the clause of the assignment, above extracted, to be paid in full, before the nominal classification, in the order of preference of the debts embraced by the assignment, commenced.

The plaintiffs had declined to come in under the assignment, or to execute a release of their claims. The assigned property, it was proved, in addition to paying the claims preferred in full, would pay about thirty per cent. upon claims, nominally in the first class of the assignment, of which the holders had executed a release.

Knowles, for the plaintiffs.

Hart, for the defendant.

BOSWORTH, J. The defence in this case is, that there was an agreement on the part of the plaintiff to release the defendant. The proof shows that Zachariah Allen was the maker of three notes, payable to the Whatcheer Bank, each for the sum of \$2,000, on one of which the defendant in this suit was indorser. A short time before the failure in business of said Allen, he, desiring to have his indorser secured, went to the bank in company with the defendant and made a proposition, that if the bank would discharge the defendant from payment of the note, the three notes held by the bank should be put in the first class of preferred creditors in the assignment which the said Allen was about to make. At the same time it was stated, that unless the proposition was acceded to, the said Allen would feel bound to secure the defendant; and in that case would put the said notes in another class in his assignment. The bank acceded to the proposition. No release was however executed to the defendant; and Allen made his assignment, placing the notes of the bank in a class of preferred creditors denominated the first class; though the claims of this class were in fact postponed to a class of creditors whose claims were to be first paid in full, and amounted in the aggregate to about \$31,000.

We do not see how this defence can avail to discharge the defendant. His liability as indorser of the note was fixed;

and no release was in fact executed. If the plaintiffs made an agreement with Mr. Allen of the nature set up, it could avail the defendant in this suit only on the ground of an estoppel, since his liability as indorser had become fixed and no release had actually been executed. The agreement to release was made with Allen on the faith that the plaintiff's three notes should be put in the first class of preferred creditors' claims. The class in which they were put was denominated in the assignment, class first; but the fact, that a class of creditors whose claims in the aggregate amounted to the large sum of \$31,000, were preferred to this class, and were to be paid in full, before anything could be received by this first class, renders this denomination a misnomer. It appears by the testimony of the president of the bank, that when the proposition was made to put the three notes in the first class with the other banks, Mr. Allen was asked what he called the first class; if it was the first thing preferred in the assignment? and he said it was. It also appears by the testimony of the same witness, that prior to the assignment of Allen the defendant called upon the bank and asked to have his name released from the paper; and that the bank answered that his name could not be released from the paper until the assignment was on record, and Mr. Allen had carried out what he had agreed to do. In this state of proof the defendant had no reason to expect that the plaintiffs would discharge him from the note, unless the three notes were put in a class of claims first preferred in the assignment of Mr. Allen. This we think was not done in the manner in which the plaintiffs did understand, and had a right to understand, that it should be. They hold the note, therefore, unaffected by the agreement, and must have judgment for the amount of it, with interest and costs.

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GEORGE C. NIGHTINGALE & another, Assignees, v. JOHN P.
SMITH & others.

Where an assignor excluded from a preference under his assignment those of his creditors who had received, or were entitled to receive, a dividend upon their claims against him under *any other* assignment, he was held not to intend to exclude from his preference those of his creditors by promissory note, who, by neglecting to release a prior assignor who had indorsed his notes, were thrown into such a class under another assignment, that, to his knowledge, when he executed his, they could not possibly receive any dividend under the other.

To meet acceptances of his commission agents, advanced to him on consignments, the assignor had purchased with his checks on banks and remitted to his agents, bankers' drafts on short time, indorsed by him. His checks not being paid, the bankers did not send funds to take up their drafts; so that the agents had to provide for their acceptances, out of their own funds; and the result, at the time of the assignment, was, that a balance of account was due from the assignor to them. The checks, drafts, and balance of account were all embraced, by description, in the first class of the assignment. *Held*, that the commission agents should receive a dividend under the assignment upon their balance of account, and the bankers on the amount of the checks, less the dividend received by the commission agents.

BILL IN EQUITY by the assignees of Zachariah Allen for instructions in the administration of a trust for creditors, created by a general deed of assignment.

The deed, which bore date the 30th day of September, 1858, conveyed all the property of the assignor; and after ordering the sale of the same and payment out of the proceeds of the expenses of the trust, and certain debts which were to be paid in full, appropriated the balance of the proceeds to the payment of the debts of the assignor, which, in order of preference, were divided into three classes,—the two first classes of which, as a condition of preference, were to be released by their holders; the third, and last class, consisting of debts described in the two first classes and not released, and of debts not falling within the descriptions of the two first classes. The instructions prayed by the bill related to the payment of a dividend to debts falling within the first class, so called, of the assignment, the description of which was as follows:—

“CLASS I. First to the payment in full, if sufficient, otherwise ratably, of all sums justly due from me on my promissory notes and checks on bank outstanding, signed by me or

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by my authorized agent, which were originally given exclusively for my own indebtedness as principal, and not otherwise; and which (1) have not been secured in anywise by me, by any mortgage deed of real or personal estate, or by pledge of negotiable paper on which I am not personally liable; and which (2) are not new notes representing debts or obligations for which I am or was liable as indorser or surety on the paper of some other person, firm, or party; and which (3) are not new notes representing old obligations on which I am or was liable as drawer of any draft accepted by some other person, firm, or party; and which (4) are not notes entitled to, or which have received or may receive a dividend from the heretofore assigned estate of some other person, firm, or party, whether such assignment were voluntary or otherwise; nor notes which represent a previous debt that has received or is entitled to receive a dividend as aforesaid; also to the payment as above described, of all my new promissory notes made and signed by me or my authorized agent, and given in exchange for or representing my debts previously evidenced by my own notes indorsed by P. Allen & Sons, and which new notes were given by me with the intent that the original notes so indorsed, so far as they are outstanding, should be held as collateral thereto.

“ Also to the payment as above described, of the amounts due from me as indorser on the unpaid drafts of any banking company, public or private; drawn to my own order, dated on or between the 5th day of August and 9th day of September, 1857.

“ Also to the payment as above described, of all sums justly due or owing from me on a few balances of book accounts for mill supplies and merchandise purchased by me and delivered previously to the 11th day of September, 1857, including balances that may be found justly due to any bleaching company for bleaching goods delivered to me previously to the 11th day of September, 1857, and balances which may be found due to commission agents on final settlement of account sales, and balances of any debts secured by pledge of merchandise, the same being first applied in liquidation.

“ Also to the payment as above described, of all amounts due

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from me on my acceptances of drafts drawn on me. The several claims described under the different clauses of this Class I. are all to stand on the same footing, without reference to the order in which they are described."

There were three descriptions of claims falling within this class, concerning the payment of a dividend to which the bill prayed instructions. The *first*, were claims of John P. Smith & others, consisting of notes of the assignor given for his original indebtedness, and indorsed by Philip Allen & Sons. Philip Allen & Sons had made an assignment in trust for their creditors on the 27th day of November, 1857, giving preference, on condition of a release to those to whom they were the principal debtors, over those to whom they were indebted as indorsers, guarantors, or sureties, and preferring also their releasing to their non-releasing, creditors. The claimants had not released Philip Allen & Sons, and were of course thrown into the last class under *their* assignment. The debts of the releasing creditors of P. Allen & Sons amounted to about \$1,180,000; whereas, their whole property, which had been sold prior to the execution by Zachariah Allen of his assignment, had realized only about \$425,000. The above facts were all known to Zachariah Allen on the 30th day of September, 1858, when he executed his assignment. If these facts did not exclude the claimants from a dividend as creditors in the first class of the assignment they had entitled themselves thereto by duly releasing the assignor.

The *second* claim, concerning which the assignees desired instructions, was that of the Mechanics' & Manufacturers' Bank. The bank held a note of the assignor for \$4,000, given by him for his original indebtedness, and indorsed by Philip Allen & Sons, which note not being paid at maturity, the assignor gave a new note to the bank for the same amount, and left the old one as collateral security for its payment. In executing its release to the assignor at the time limited in the assignment, the release mentioned by mistake only the first, or collateral note; but, upon afterwards receiving a partial dividend, the bank surrendered both notes, and gave a receipt and discharge of the last.

The *third* and *last* description of claims consisted of those of

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Messrs. Wood & Erringer, of Philadelphia, commission agents of the assignor, to whom he was indebted in a balance of account, and those of Messrs. Daniel W. Vaughn & Co., brokers and bankers, of Providence, now assigned to Walter S. Burges, Esq., and which consisted of the assignor's unpaid checks drawn upon banks in Providence, in their favor. To meet certain renewed acceptances of Messrs. Wood & Erringer, which they had advanced to the assignor upon consignments, he purchased of D. W. Vaughn & Co., their drafts upon New York, with his own checks upon banks in Providence; and, having indorsed the drafts so purchased, remitted them to Messrs. Wood & Erringer. The banks refusing to pay all the assignor's checks, D. W. Vaughn & Co. only partially remitted funds to New York to meet their drafts, and, in consequence, Messrs. Wood & Erringer were obliged, in great part, to take up their acceptances with other funds,—leaving them an unpaid balance of account against the assignor, for which they held the drafts of D. W. Vaughn & Co.; Vaughn & Co. holding the unpaid checks of the assignor which they subsequently assigned to Burges. In this condition of things the present assignment was made; and both Wood & Erringer and D. W. Vaughn & Co., having duly released the assignor, claimed to prove their claims for a dividend under the first class in the assignment. The instructions desired by the assignees related to these claims, and what amount of claims these claimants were respectively entitled to prove for such dividend.

Bradley, for the assignees.

Payne, for John P. Smith & others.

Hayes, for Wood & Erringer.

Burges, *pro seipso*.

AMES, C. J. The claims of John P. Smith & others are embraced in the general description of claims preferred in the first class of this assignment; and the first question put to us by the assignees in their bill for instructions is, whether these debts are excluded from this preference by the fourth exception to the claims thus described, upon the ground, that by virtue of them, the claimants were entitled to a dividend under the assignment of Philip Allen & Sons.

Nothing is better settled at this day than that, to understand what the maker of an instrument intends by his description of the subjects or objects of his conveyance, the court is entitled to know precisely what he knew with regard to them, so that it may occupy his position in construing his language. Now the facts stated in the bill show, that although these claims were embraced in the prior assignment of Philip Allen & Sons, yet, when *this* assignment was made, their condition was unalterably fixed in such a class under *that* assignment, that it was reduced to an absolute certainty that they could receive no dividend under it. The assigned property of Philip Allen & Sons had all been sold; its proceeds precisely ascertained; and the result was, that there remained only \$425,000, to be apportioned amongst debts of the first class, amounting to \$1,180,000. As the claimants had not released Philip Allen & Sons, and the time for release had elapsed, they were postponed in payment to this vast mass of debt, and, as the bill states, their condition in this respect was well known to Zachariah Allen when he used in *his* assignment the above words of exception.

With these facts before him, we are all satisfied that it was not his intent to exclude the present claimants from the first class in his assignment by his fourth exception in the clause descriptive of that class. The claimants could not have been in his view *entitled* to a dividend under the assignment of Philip Allen & Sons, when he knew that under the circumstances it was absolutely impossible that there ever could be a dividend for them to receive. A title to that, which to his knowledge could have no existence, can hardly have been intended by him to exclude from his preference those whose claims, in his view, otherwise entitled them to it. His substantial meaning in this exception plainly was, that those should not be included in the first class of *his* assignment, who had received or might receive, and not might *have* received, a dividend under *any other*. His assignment speaks from the day of its date; and whatever might have once been the position of these claimants under the assignment of Philip Allen & Sons, must be construed to regard them, in the position in which they

then stood, as wholly excluded from the chance of dividend under that assignment.

The criticism, that the specification, as preferred, of certain new notes of the assignor given for debts previously evidenced by his notes indorsed by Philip Allen & Sons, which follows the fourth exception, upon this construction of the exception, is not warranted by the context. The notes before mentioned as preferred, and to which all the exceptions apply, were notes "originally given exclusively" for the assignor's "own indebtedness as principal, and not otherwise;" whereas these new notes were preferred without reference to the origin of the debts which they represent.

Our instruction to the assignees, therefore, must be to pay the claims in question *pari passu* with the other claims in the first class of the assignment, as not within the fourth exception to the claims first mentioned therein as preferred.

In this view of the fourth exception, the question with regard to the claim of the Mechanics' & Manufacturers' Bank ceases to be of any importance. The amount of their old note, which, under the above construction of the exception, is entitled to dividend in the first class of the assignment, was precisely equal to that of their new one; and whichever was technically released, their right of dividend remains the same. It becomes unnecessary, therefore, to decide, whether the mistake in their release, coupled with the fact that they have surrendered, and the assignees have accepted the surrender of both notes, is not tantamount, in equity, to a technical release of both.

The claim of Wood & Erringer, which is for a final balance of their account with the assignor as his commission agents, and of D. W. Vaughn & Co., on unpaid checks on banks, signed by the assignor, are both embraced in the first class, so called, of the assignment. Wood & Erringer have received, however, from the assignor, in payment of their balance, certain drafts of D. W. Vaughn & Co., which the assignor purchased of the latter firm with his unpaid checks on bank now held by them, or by their assignee Burges. So far as the drafts of D. W. Vaughn & Co. remitted to Wood & Erringer have been paid, they sink the balance of their account against the as-

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signor; leaving them for the remainder of their balance the double security of the assignor's liability, and the drafts of D. W. Vaughn & Co. Upon this remainder of their balance only, are Wood & Erringer entitled to a dividend; and as the receipt of this dividend from the estate of the assignor, will, so far, go to decrease the liability of D. W. Vaughn & Co. upon their drafts to Wood & Erringer, D. W. Vaughn & Co. should be allowed to prove only for the balance of their checks, after deducting the dividend received by Wood & Erringer.

SIMON HUTCHINSON & others v. JONATHAN COLE.

A widow, made by her husband's will life-tenant of his real estate, was also authorized by the will, in case she should require anything more than the profits of the estate, for her comfortable support and maintenance, to sell so much of it, as should, in her judgment, be necessary for that purpose; and the remainder of said estate, if any, was to go to the son and certain grandchildren of the testator, in such manner and proportion as she, by her last will and testament might direct. She married again; and just before the marriage conveyed the homestead estate of her old husband to her new one, for the nominal consideration of twelve hundred dollars, "said sum," as she expressed it in her deed, "being necessary, in my judgment, for my comfortable support." The real consideration of the deed, however, was the contemplated marriage, and about one hundred dollars paid to her by her betrothed, the defendant, at the time the deed was executed, to enable her to settle a debt she was owing. *Held*, that this was a fraudulent execution by the widow of the power of sale entrusted to her; and that upon her death, intestate, those entitled to the estate in remainder under the will of her first husband might, in equity, compel her second husband, as their trustee, to convey the estate to them, according to their interest, upon condition of repaying to him the hundred dollars with interest, after deducting therefrom the rents and profits of the estate, received by him since the death of the life-tenant, with all just allowances.

BILL IN EQUITY by the remainder-men of a small estate, in Smithfield, late the homestead of William Hutchinson, to set aside, as unauthorized and void, a conveyance of the same in fee to the defendant, by a life-tenant, under a power of sale contained in the will of said William.

William Hutchinson, who was the owner of said estate and other property, real and personal, of no great value, made his last will and testament, bearing date January 4, 1850, which

was, afterwards, upon his death in 1855, duly proved and recorded. By this will, after ordering his just debts and funeral expenses to be paid out of his estate, he disposed of it in the following manner:—

“Firstly. I give, devise, and bequeath unto my wife, Elizabeth Hutchinson, all my estate and estates, real, personal, and mixed, for and during the term of her natural life; and in case my said wife shall require anything more than the profits of said real estate for her comfortable support and maintenance, then, in that case, I authorize and empower my said wife to sell so much of my said real estate as shall, in her judgment, be necessary for her comfortable support and maintenance through life. And my will is, that all the remainder of my estate, after the decease of my said wife, if any, shall go to my son, Simon Hutchinson, and to all my grandchildren, except Frances Brown, daughter of my late son, Burrill Hutchinson, deceased, in such manner, and in such proportions, as my said wife, in and by her last will and testament, shall direct.” The will also constituted Elizabeth Hutchinson the sole executrix of the testator.

Under this will, Elizabeth Hutchinson, having duly qualified herself as executrix, possessed herself of all the estate of the testator, real and personal, and paid his debts; but never having settled any final account with the court of probate of Smithfield, the precise amount of the personal property or of the debts did not appear; and evidence was submitted to the court, on both sides, for the purpose of proving the same, and the consequent adequacy or inadequacy of the profits of the real estate, after the satisfaction of the debts, to afford a comfortable maintenance to the life-tenant. As the case did not, however, in the judgment of the court, turn upon this evidence, it is unnecessary to detail it here.

The real estate of the testator consisted of his small homestead, of about ten acres, with a dwelling-house and other buildings thereon, and of a lot of land in the vicinity of it, of about three acres. On the 9th day of December, 1857, his widow, the tenant for life, by her deed with warranty, reciting the power of sale, conveyed the homestead estate of her late

husband to the defendant for the nominal consideration of twelve hundred dollars, "said sum," as she says in her deed, "in my judgment being necessary for my comfortable support," and about a week afterwards, intermarried with him; he being a widower, and a man of considerable substance. Both in his answer, and in his testimony, for he was examined as a witness, the defendant admitted that the consideration named in the deed of Elizabeth Hutchinson to him, was merely adopted as a measure of the value of the estate, which was worth not less than one thousand dollars, nor more than sixteen hundred dollars, and that the real consideration of the deed was, the marriage between himself and the said Elizabeth, and about one hundred dollars which he paid to her at the time the deed was executed to enable her to settle some debt which she was owing. [He further testified, that early in the spring next after the death of William Hutchinson the said Elizabeth urged him to buy the estate, first for the sum of \$2,000, and afterwards for the sum of \$1,800, both which offers he declined, and advised with him about selling it to a Quaker for \$1,500, which he advised her to do, inasmuch as the cost of labor, and of taxes and repairs, would amount to more than the income would repay; that the trade with the Quaker fell through, when, not far from the time of their marriage, she again urged the defendant to buy the estate, telling him that she was afraid to live there alone, with no neighbors but old-country folks, and that she cried of nights, she was so lonely, and liable to fall sick. The defendant testified that he inquired of her why she did not board out, to which she replied, that she was afraid to leave her goods there; but that she had heard the defendant had taken an aunt of his former wife to board with him for her property, and wished him to take her; that the defendant told her — he being a widower and she a widow — that would not look well, and then proposed marrying her, and talked about a deed of the estate, although he had not thought much of marrying her before; that they talked about the value of the place, and the defendant told her that she would probably be more expense to him than it was worth; but then she was a likely woman.

The conveyance in question and a marriage between the parties was the result of these and similar conferences, but Elizabeth dying suddenly, intestate, on the 7th day of April, 1859, this bill was filed by the plaintiffs, consisting of the son and grandchildren of William Hutchinson, who were entitled to the estate in remainder, as they claimed, under the will of said William, praying that the conveyance by Elizabeth to the defendant, might, both because the profits of the estate were sufficient for her support, and because the deed was executed in fraud of the power, be declared void; or that the defendant might be declared to be a trustee of the estate conveyed, for them, according to their interest under said will, and be ordered to convey the same to them respectively according to such interest, and for further relief.

Thurston & Ripley, for the complainants.

1. Elizabeth Hutchinson took, by the will of her husband in the real estate in question, an estate for life, with a naked power to sell, dependent upon the contingency of her requiring "anything more than the profits of said real estate for her comfortable support and maintenance." *Stevens v. Winship*, 1 Pick. 318; *Larned v. Bridge*, 17 Ib. 341.

2. The happening of the contingency was a condition precedent to the right to sell. *Minot v. Prescott*, 14 Mass. 496; *Larned v. Bridge*, 17 Pick. 342; *Dyke v. Ricks*, Cro. Car. 335.

3. The recital in the deed of Elizabeth Hutchinson to the defendant, that the consideration of \$1,200 alleged to have been received, was, in her judgment, necessary for her comfortable support, is no *estoppel* upon the complainants; it is open to them to show that the contingency upon which a good title could be made, never, in fact, happened. *Minot et al. v. Prescott*, 14 Mass. 496.

4. No money consideration was in fact ever paid for the conveyance, the real consideration of which was the marriage of the life tenant with the defendant.

Weeden, for the defendant.

Elizabeth Hutchinson, the defendant's grantor, was, by the will of her husband, authorized to sell so much of his real estate as should, in her judgment, be necessary for her comfortable

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support and maintenance through life. She exercised this judgment, and decided the sale of the estate conveyed to him to be necessary, and expressed the same in the deed to him. The true consideration of the deed was a marriage contract to be performed by the defendant, which was executed a few days after the deed, and enured as a good consideration for it. *Spencer v. Smith*, 5 Conn. Rep. 117, and cases cited; 4 Kent's Com. 465. The expression of a pecuniary consideration is mere matter of form, and the true consideration may be proved. *Wood v. Beach et al.* 7 Verm. 528, and cases cited; *Meeker v. Meeker*, 16 Conn. 387; *Clapp v. Turell*, 20 Pick. 247; *McCrear v. Piermont*, 16 Wend. 460. Elizabeth Hutchinson was not required by the will to sell only enough to supply her wants from time to time; but "through life." The estate was unproductive, and afforded no income to her at the time of sale, and she had then less means on hand than she brought to her husband's estate. The consideration of her support, under the contract of marriage, was more eligible for her than a retention of the property; since it secured her support during the life of the defendant, and if she survived him, dower out of all his lands.

AMES, C. J. The bill, in substance, alleges two grounds for the relief asked; first, that the contingency upon which, under the will of her husband, the power of Elizabeth Hutchinson to sell the real estate of which she was constituted tenant for life, never arose; and, secondly, if it did arise, that the conveyance made by her to the defendant, upon the consideration disclosed, was made in fraud of the power.

Upon the first of these grounds, we doubt whether sufficient cause is shown for the interposition of the court. There is certainly room for question upon the evidence, whether, after satisfying the debts of the testator out of his personal estate, as far as it would go, and the balance of them, so far as the personal estate was deficient, out of the realty upon which they were charged, the profits of a small house in Smithfield, and of some thirteen acres of farming land, were sufficient, in the hands of a woman, for her comfortable support and maintenance, however humble might be the scale upon which, according to her condition and expectations, we might be disposed to adjust it.

But upon the other ground alleged, the proof clearly brings the case within the jurisdiction of the court, both for discovery and relief. It is, that the life-tenant *colorably* sold the estate to the defendant for the sum of twelve hundred dollars, but *really* conveyed it to him without money consideration, for the purpose of promoting herself in marriage. It is not contested that this was substantially the fact; the main consideration of her conveyance being, that the defendant would marry her, although, as he swears, he paid her, at the time of the execution of the deed one hundred dollars, to enable her to settle a debt which she was owing. Now the question is not, as was argued for the defendant, whether this was not the best and most comfortable way in which the life-tenant could provide herself with a support by means of the estate, which, for that purpose she was empowered to sell; but, whether it was such an execution of the power as satisfied the intent of the testator in giving it. The will makes the widow but a life-tenant, with remainder in fee to the testator's children. A power is given to her to sell so much of the real estate as in her judgment shall be necessary for her comfortable support and maintenance through life, provided the rents and profits, to which she would be entitled as tenant for life, should prove insufficient for that purpose. In other words, the power to sell and to appropriate the proceeds of sale, so far as necessary, to her maintenance, was, to assure it, given to her, in addition to her right to rents and profits as tenant for life. To sell a portion of it, or to sell or encumber the whole of it, as her necessities might require, and to apply the proceeds to their relief, — in other words, the common sense of such a provision, was undoubtedly what was in the mind of the testator when he made it. Nothing, probably, was further from his thoughts, than that he was conferring upon his widow a power to buy with his estate, within a few months of his death, an eligible marriage for herself, to the disinherison of his children. The result illustrates how completely such an execution of the power defeats, to the injury of those entitled in remainder, the probable intent of the testator. Within fifteen months of the marriage thus purchased, the widow of the testator, now wife of the defendant, dies, leaving

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the defendant the gainer of this estate, at the expense of the remainder-men, in addition to having enjoyed during this interval the happiness of the society, as he gives us to understand, of the best of wives. The widow undoubtedly had a right to marry again, and for aught that we know, wisely chose her husband; but good as he might be, she had no right, under this power, to buy him with the estate of his predecessor; thus staking the property of others, as well as her own well-being, for what has proved to be so short lived a happiness. This was, in the sense of a court of equity, and for the purpose of its relief, a fraudulent execution of the power of sale entrusted to her; and the defendant, who was a party to the fraud, can derive no profit from it. 2 Sugden on Powers, ch. 11, § 2, and cases quoted.

Let a decree be entered declaring the defendant a trustee of the estate in question for the respective plaintiffs in proportion to their interest as remainder-men under the will of William Hutchinson, and as such, ordering him to convey said estate to them in that proportion. As there is some proof that the defendant, in consideration of the conveyance to him, paid a hundred dollars to Mrs. Hutchinson, in addition to marrying her, let a master inquire into and report upon that fact, as well as prepare and superintend the conveyance to be executed by the defendant. If it turns out that such a partial valuable consideration has been paid by the defendant, the return of it, with interest, must be secured, as the condition upon which a court of equity will relieve against such a fraud. *Daubeny v. Cockburn*, 1 Mer. 626.

The bill does not specifically pray for an account of the rents and profits of the estate received by the defendant since the death of the life-tenant, but we think that the plaintiffs, under the prayer for general relief are entitled to it in recoupment against the one hundred dollars and interest; and, therefore, order the master to take such an account, making the defendant all just allowances.

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GEORGE C. NIGHTINGALE v. HARRIS & LIPPITT & another.

An assignment by an insolvent debtor in trust for the benefit of his creditors with preferences to certain creditors on condition that they will release the assignor within a reasonable time limited in the assignment, is a valid trust in Rhode Island; and the rights of the creditors, as *cestuis que trust* under it, will be protected in equity against sale, under an execution against the assignor levied upon the assigned property subsequently to the assignment.

Such an assignment is not invalidated by the fact that it does not purport to convey all the assignor's property, if in truth it does convey all his property, except what is excepted by law from attachment.

Nor is it invalidated by the fact that it prefers certain creditors by giving one class thirty per cent., and another fifteen per cent. only on their claims, out of the assigned property, turning the balance over to the general creditors of the assignor, where it is plain, from the relative value of the property and the amount of the debts embraced by the assignment, that the assignor could not have designed or expected that any interest out of the assigned property would result to himself.

Nor is it to be held fraudulent and void under the statute of Rhode Island against fraudulent conveyances, merely because it appropriates in payment to creditors who have, under a former assignment shortly before released the assignor, without payment or upon partial payment, placing them upon an equality with non-releasing creditors; although the court will instruct the assignor to pay nothing out of the assigned fund upon the released claims.

BILL IN EQUITY by an assignee of an insolvent debtor under a voluntary assignment, to enjoin the sale of a portion of the assigned property under an execution levied upon it by certain creditors of the assignor, and for instructions.

At the hearing of a motion for a special injunction of the sale, which, as there were no facts in contest, it was agreed should be a final hearing, it appeared, that on the 30th day of September, 1858, Zachariah Allen, of Providence, a large cotton manufacturer, assigned to the plaintiff and William M. Bailey all his estate, real and personal, in trust, for the benefit of his creditors, and that the assignment, after providing in full for certain claims for labor, and debts contracted by the assignor after he has stopped payment and whilst negotiating for an extension and before he made his assignment, divided, without specifying the amounts, the debts of the assignor into three classes, with preferences in that order, and with condition, so far as the holders of the first two classes of debts were concerned, that in order that they should be entitled to such prefer-

6	821
18	171
14	477
6	321
17	229
6	321
129	44

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ences, they should, on or before the 31st day of December next succeeding, release under seal their claims against the assignor; no release being required from the third or unpreferred class of creditors. It appeared from the affidavit of the plaintiff, that the total amount of the debts of the assignor exclusive of those secured by mortgage and other pledge of property, was about \$425,000; and that \$255,680 of this amount of debts was included in the first class of the assignment; that he and his co-assignee Bailey had sold the most valuable portion of the assigned estate and had paid fifteen per cent. upon their claims, amounting to \$31,415.16, to the creditors of the first class, who had availed themselves, by releasing, of their preference under the assignment, and that the balance of the assigned property would give to that class of creditors about as much more, leaving nothing to come to creditors of the second class. It further appeared that, on the 19th day of August, 1859, Zachariah Allen, by the death of his sister, Ann Allen, intestate, became entitled to one undivided fifth part of her estate, real and personal, the whole being valued by the assessors of taxes at \$81,470, which valuation, according to the affidavit of the plaintiff, was more than the estate, when sold, would probably realize. On the same day, and immediately after the death of his sister, Zachariah Allen made another assignment to the plaintiff, embracing all his right, title, and interest, as one of her heirs at law and next of kin, in the estate of his said sister, which, after the usual clause providing for the sale of the assigned property and the payment of the expenses of the trust, ordered the plaintiff, as assignee, to appropriate the residue of the proceeds of sale to the payment of the following classes of debts, in the order and manner, and on the conditions thereafter specified, to wit:—

“CLASS I. First, to the payment of thirty (30) *per cent.* on all just and liquidated debts (except judgments on other claims than those evidenced by notes or other negotiable paper) due from me at the date of, and which were embraced, described, and provided for under Class I. of the general assignment made by me the 30th of September, 1858, to George C. Nightingale and Wm. M. Bailey, Esqrs., in trust, and duly recorded;

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and which have not been released under the provisions of said assignment. And to the payment of fifteen (15) *per cent.* to the holders, on the full amount of all notes made by me, which are entitled to, or have received, a dividend from the assigned estate of any other person or firm, whether such assignment were voluntary or otherwise, or which represent a debt that is entitled to, or has received a dividend as aforesaid, and which shall not draw any dividend, though released, under the provisions of said general assignment; and on any judgment debt not hereinbefore provided for.

"The classes of claims above specified, to stand on the same footing, as to their right to receive the several *per centages* provided for them respectively, notwithstanding the order in which they are named.

"CLASS II. It is hereby further provided, that after making all the payments in this instrument, before provided for, the residue of said proceeds shall be applied to the payment in full, if sufficient, otherwise, ratably, of all other just debts and liabilities of whatever nature, due from me at the date of, and described, embraced and provided for under Class II. of the said general assignment of 30th of September, 1858, notwithstanding any release of the same or any portion of them, under the provisions thereof; always excepting, however, claims specially secured by pledge of negotiable paper, on which I am not personally liable.

"*Provided, nevertheless*, that all and singular the provisions for the payment of claims under Class I. and Class II. respectively, in this instrument before contained, are made upon the express conditions following, viz.:

"That the holder or holders of any such claims against me as are specified in Class I. of this instrument, do and shall, on or before the expiration of *four* months from the date hereof, and the holder or holders of any such claims as are specified in Class II. of this instrument, do and shall, on or before the expiration of six months from the date hereof, (except as to such claims as have been heretofore released,) respectively come in under this assignment, and as to such claims accept the terms thereof, and in consideration of the provisions for pay-

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ment to be received therefrom, shall respectively, — the holders of said Class I. claims, on or before the expiration of four months, and the holders of said Class II. claims, on or before the expiration of six months from the date hereof, — execute and deliver to me, the said assignor, a release under seal, of their several claims against me.

“CLASS III. And it is lastly hereby provided, that after making the payments hereinbefore provided for, the residue of said proceeds shall be applied to the payment of all other debts due and owing from me.

“And I hereby authorize and empower my said assignee to settle, compromise and adjust all claims and matters arising under this assignment, by arbitration or otherwise, as he may deem best for all interested therein.”

This assignment, which was acknowledged and lodged for record, on the day of its date, August 19, 1859, conveyed, according to the affidavit of Zachariah Allen, all his property at the time of its execution except what was exempted from attachment by law. By the affidavit of the plaintiff the amount of debts embraced in the 30 per cent. clause of the first class, was \$44,188.17 — and the whole amount of debts embraced in the 15 per cent. clause was \$21,720.06, the two percentages when added, $\$13,256.70 + \$3,258 = \$16,514.70$, which exhausted, if all the creditors in the first class came in under the assignment, the whole probable value of the assigned property, leaving nothing to pass to the creditors of the second class.

The defendants, Messrs. Harris & Lippitt, who were execution creditors of the assignor, Zachariah Allen, in the sum of \$5,512.80, debt and costs, on the 20th day of August, 1859, levied their execution upon the assignor's interest in the real estate embraced in the assignment, and the same was advertised to be sold by the sheriff under the levy on the 28th day of November, 1859. The plaintiff, the sole assignee of Zachariah Allen, under his last assignment, thereupon filed this bill perpetually to stay the sheriff's sale, and for instructions in the execution of his trust; and now moved for a special injunction of the sale until the hearing of the bill and further order of the court.

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W. H. Potter, for the complainant.

1. There is nothing on the face of this assignment, which, in Rhode Island, will make it void. Such instruments are not here taken separately from the extrinsic facts, and with these, the preferences by percentages were made for the purpose only of a more equitable distribution of the assignor's property amongst his creditors.

2. As to the provision for released debts, Class No. I. in the assignment, which includes only debts released under the first assignment which have received no dividend, will swallow up the whole assigned property, if the creditors in that class should execute a release within the time prescribed.

Such a provision does not avoid the whole assignment, as a preference of a fictitious debt or a reservation of property for the benefit of the assignor or his family might do, but the court deciding that the application in favor of released debts is void, the property might in consistency with the assignment go to satisfy the existing debts of the assignor.

The preference is not of a fictitious debt, but of debts unpaid, though released. The moral obligation remains as before; and if the provision in the assignment to pay does not revive the legal right to enforce them, as in the case of a debt discharged by proceedings in bankruptcy, or barred by the statute of limitations, or of a note from which, for want of due notice, an indorser is discharged, all of which are revived by promises to pay, at least the assignment is not void for fraud, inasmuch as in this respect it does not attempt to appropriate the property to any but an honest purpose.

If the assignment is to be avoided for this cause, why not, if it should turn out that it embraced claims which were supposed by the assignor to be debts, but which it was decided, after contest, were not such. The case of *Curtis et al. v. Leavitt*, 1 Smith (N. Y.) R. 9, shows the modern doctrine in equity to be that nothing avoids a conveyance but actual fraud.

Bradley, with whom was *T. A. Jenckes*, for the respondents.

1. It is not according to the usage of courts of equity in this state to enjoin a sale under an execution because of any alleged

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defects in the right of the creditor to offer the property for sale under the levy.

2. The assignment is void because it does not purport to assign all the debtor's property, or to give all that is assigned to the creditors, but only enough to pay certain percentages, and yet requires a release in full of the debts. *Jacob v. Corbitt*, 1 Cheves, Ch. Rep. 72; 1 Am. Leading Cases, 71, and cases cited; *Stewart v. Spencer*, 1 Curtis, 165; *Spencer & Pierce v. Jackson*, 2 R. I. 35. The cases in 2 Rhode Island, and 1 Curtis, consider an assignment of part of a debtor's property requiring a release as extreme and doubtful. This assignment adds a most objectionable feature, limiting the right, even of judgment creditors, to the receipt of 15 per cent. of their claim.

3. The assignment allows those who are not creditors to share the estate with those who are, and on more favorable terms. This makes an assignment fraudulent on the face of the deed and void. See 1 Am. L. Cases, 69; 2 Kent, 732; *Durfee's case*, 5 R. I. Rep. 401; *Halsey v. Whitney*, 4 Mason, 230; *Hyslop v. Clarke*, 14 Johns. 458; *Harris v. Sumner*, 2 Pick. 129; *Fiedler v. Day*, 2 Sand. S. C. Rep. 594; *Webb v. Dagget*, 2 Barb. Sup. Ct. R. 9; *Planck v. Schermerhorn*, 3 Barb. Ch. 644; *Wakeman v. Grover*, 4 Paige, 23; *Rogers v. De Forest*, 7 Ib. 272; *Mackie v. Cairns*, 5 Cowen, 547; *Goodrich v. Downs*, 6 Hill, 438; *McClurg v. Lecky*, 3 Penn. 83; *Snow v. Keene*, 3 Wharton, 347; *Passmore v. Eldred*, 12 Serg. & Rawle, 198; 1 Rawle, 163; 2 Penn. 92; 7 Watts & Serg. 219; *Albert v. Winn*, 7 Gill, 446.

4. The statement by the assignee, if proved, would not change the character of the assignment; for upon its own showing, all the creditors of the 1st class must release, or the illegal provisions of assignment in the 2d class come into play. None have yet released, though the time has nearly expired under the 30 per cent. and the 15 per cent. provision. Those creditors might have taken 30 per cent. under the first assignment, and declined it. The presumption is, that most if not all will decline it. *But the character of an assignment containing illegal provisions upon its face is not saved by parol evidence that possibly or probably those provisions will become in-*

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effectual. *Boardman v. Halliday*, 10 Paige, 230. This was the case of an assignment preferring certain claims, no release being required; and that the surplus should be distributed in the assignees' discretion. The property was not sufficient to pay the preferred creditors; *Held*, that the assignment was void because of the discretionary clause. The court say, "The fact stated in the answer, that the assignees have ascertained that the assigned property will not be sufficient to pay the creditors whom the assignor has himself preferred, cannot change the character of the assignment. For when the assignment was made, the fact that the property would not be sufficient to pay the preferred creditors was not ascertained, and probably was not supposed to exist. And the assignment itself shows that the assignor contemplated the possibility of there being more than enough to pay all his debts, as it contains an express provision for the payment of the surplus to him in that event. The failure to realize as much from the assigned property as was originally anticipated, cannot, therefore, render an assignment valid which was void at the time when it was executed." In *Mead v. Phillips*, 1 Sanford Ch. 83, there was a provision to pay expenses for suits that might be thereafter brought. None had been. To the argument in support of the assignment from this contingency the court say, (p. 87,) "It is no answer to the argument, that the power is contingent, and that no occasion has arisen for its operation. The same was said of the coercive clause in *Wakeman v. Grover*, 4 Paige, 23, and 11 Wend. 187. The question is, What does it enable the debtor to accomplish? and the law presumes that he intended all that the instrument provides. I cannot resist the inference of a fraudulent intent on the part of Phillips in this provision of the assignment." In *Wakeman v. Grover*, 4 Paige, 42, one of the provisions was, that the assignees might compound with the creditors. This is the most objectionable feature of an assignment, "illegal and void on its face." And the chancellor says, (p. 42,) "I do not believe that the respectable gentlemen who are named as assignees in this case would allow themselves to use the power conferred on them in this way. But it might be used in that way by friendly assignees named by the debtor. It is therefore

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to the principle of such a provision that I must enter my dissent. If it can be sanctioned in this case, it would be equally valid in an assignment to a trustee who would not be restrained from exercising his power by any very nice scruples on the subject."

AMES, C. J. An assignment by an insolvent debtor in trust for the benefit of his creditors, with preferences upon condition of a release, has always been regarded in Rhode Island as a valid and subsisting trust; and by statutory enactment, long in force, this court has been vested with summary powers, which for years past it has frequently exercised, to guard and enforce the rights of the creditors, as *cestuis que trust* under such a conveyance. Rev. Stats. ch. 164, §§ 12-17. We cannot, therefore, doubt our general power and duty as a court of equity, to enjoin those who without right seek to harass or obstruct a trustee in the performance of his duties under such a trust as this, or, by sale of the trust property upon an execution unlawfully levied upon it, to cast a cloud upon the trustee's title, and embarrass the creditors in electing whether they will, within the time reasonably appointed by the assignor, come in under and accept the terms of the trust. Our jurisdiction in this respect is as clear as, upon the proper call of the assignee, to construe the trust deed, and instruct him in the performance of his duties by virtue of it.

In answer to the assignee's claim for protection in this case, it is, however, objected, that this assignment is void:—

First, because, although it does not upon its face purport to convey all the assignor's property, but only certain property to which he recently succeeded upon the death of one of his sisters, it gives, by way of preference, to the first two classes of creditors as they are arranged in the instrument, certain percentages only upon their debts, upon condition of a release in full, leaving the surplus, if any, to go to the assignor's non-releasing creditors; and,

Second, because it prefers, by way of a percentage, certain former creditors of the assignor, who have already released him in consideration of a right of dividend under his first general assignment.

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It is said that for these causes this assignment is rendered void by our statute against fraudulent conveyances, which, amongst other things, enacts, that every conveyance of lands or chattels "had, or made, or contrived of fraud, covin, collusion, or guile, to the intent or purpose to delay, or hinder, or defraud creditors of their just and lawful actions, suits, debts, accounts, damages, or just demands of what nature soever," shall be deemed and taken, "as against said person or persons, his, her, or their heirs, successors, executors, administrators, or assigns, and every of them, whose debts, suits, demands, &c., by such guileful and covinous devices and practices as aforesaid, shall or might be in any wise injured, disturbed, hindered, delayed, or defrauded, *to be clearly and utterly void*; any pretence, color, feigned consideration, expressing of use, or any other matter or thing, to the contrary notwithstanding." Rev. Stats. ch. 259, § 1; Supplement to Rev. Stats. of 1857.

Without doubt, an assignment for the benefit of creditors may contain a clause so plainly indicative of the fraudulent intent pointed at by this statute, as to carry its death-wound upon its face; such as a gratuitous provision out of the assigned property for the insolvent assignor or his family. Except, however, in such glaring cases, incapable of any just or honest explanation, we should be departing far from the usage of well-instructed courts of any sort, and especially of courts of equity, if we should attempt to pronounce upon the intent of the maker of any instrument without the aid of all those facts relating to the subjects and objects of his conveyance, which, by placing us in the precise point of view from which he contemplated his act, will enable us to ascertain what he intended by the language he used, and, consistently with that language, why he intended it.

It certainly is not honest for a debtor to endeavor to extort from his creditors a full release, upon a partial cession of his property; especially when, as in the case of *Stewart et al. v. Spencer et al.* 1 Curtis, C. C. R. 157, referred to in the argument, he secretly runs away with the most available portion of his assets, and leaves an assignment behind him of the balance only of his property, stipulating for a release, as the means by

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which he may secure himself in the enjoyment of his dishonest reservation. But once grant that the policy of the law admits, as ours does, that an insolvent debtor may provide in his assignment that his creditors shall release him in order to take any benefit under it, and we apprehend that the fact that the assignment does not purport, upon its face, to convey all his property, is rather a badge of fraud than conclusive evidence of it; and that if it shall be shown by proof, as it may be consistently with the deed, and as, in this case, it is, that in truth the assignment does convey all the debtor's property, this badge of fraud will be completely torn off, and the case stand before us precisely as if the assignor had made the strongest professions in his deed, that the assigned property was all that he had. On the other hand, however strong might be his professions in this respect, if the fact was, that whilst concealing a substantial portion of his property, he was exacting by his assignment a full discharge of his partially paid debts, it would more clearly condemn him, from its very inconsistency with what he avowed.

The same line of remark applies to the other branch of the first objection to this assignment: that it gives to the first two classes of creditors under it but thirty and fifteen per cent. respectively upon their claims, and the balance of the proceeds of the assigned property over to the non-releasing creditors; so that, for aught that the court can know from the assignment, a large amount of property may result to the assignor from his obtaining releases in full from the first two classes of his creditors upon partial payment only. It is certain that the court can rarely, if ever, know from the assignment itself the value of the assigned property, or the amount of the debts in each class, or in whole; and so, what percentage on their claims the different classes of creditors, as they are arranged under it, will receive, and whether there will be anything after satisfying the trust, to result to the creator of it. But it can know all this from proof; and is bound thus to ascertain it before coming to the conclusion that the assignor designed to make, or has made, a conveyance, which may force any of his creditors to release him upon condition of receiving a por-

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tion only of their debts, when the assigned property is sufficient to pay them in full. It would be strange indeed, if a court of equity should insist upon arriving at a conclusion so unfavorable to the design or effect of a trust presented for its protection, upon surmise only, when, consistently with the rules of evidence, it could have, and in fact easily obtain, proof of the relative amount of the property and debts, and thereby ascertain the probable design of the assignor by knowing the precise application which through his assignment he has made of his property.

Such proof, in the shape of affidavits, is now before us ; and places it beyond doubt that so far from there being anything out of the assigned property to result to the assignor, after paying the percentages provided for the creditors in the first class and the other debts of the assignor, not a dollar will probably reach even the creditors in the second class ; leaving debts of the assignor to the amount of about \$154,000 to intervene between him and any such resulting interest as has been imagined for the sake of the argument. In such a state of facts it may be seen at once how improbable it is, that the assignor, by ordering the first class of claims to be paid in part only out of the assigned estate, designed thereby that any benefit should result to himself. The truth is, that this provision amounts, and was intended to amount, to a distribution of the assigned property, in certain proportions, between the creditors whose claims were arranged in the first class ; the balance being turned over to the creditors of the second class and to the general creditors of the assignor, to prevent the possibility that any interest in the assigned estate should result to him.

The *second* and last general objection to the validity of this assignment, that it prefers over the general creditors of the assignor, certain creditors who have already released him for the chance of dividend under his first and general assignment, remains to be considered. This provision, which, as we see from the accompanying affidavits, can practically operate only in favor of releasing creditors who have received for their releases no dividend under the first assignment, is conceived in the spirit of moral justice ; and had the assignor been dealing

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with property which was beneficially his own, does no more for the wholly unpaid or even partially paid creditors of this class, than, as a matter of general equity, ought to have been done. The fact of a release of debts under such circumstances does not discharge their moral obligation; and every honest man feels, that, in case of future acquisitions by the debtor, releasing creditors, so far as they are unpaid, ought to be placed by him, if he has the power, upon the same footing with those who have retained the power to enforce against him their claims. We are clear, however, that a right of preference can be exercised by an insolvent debtor only between valid, subsisting debts; and does not extend to those which have been discharged by act of party, as in this case, no matter how harsh, in general justice, the consequences may be. A mere moral obligation is not sufficient, as the consideration of a promise, to enable it to be legally enforced against the promisor himself; and still less to place such a promise, or an application of property in favor of such an obligation, upon an equal footing with claims against the person promising or applying which have the sanction of law.

Is, however, such an undisguised attempt in an assignment to do general justice between his releasing and non-releasing creditors, so "had or contrived of fraud, covin, collusion, and guile, to the intent or purpose to delay, or hinder, or defraud creditors of their just and lawful actions, suits, debts," &c., as by bringing it within the range of our statute against fraudulent conveyances, renders the assignment, "clearly and utterly void?" It is likened in this respect to preferences of fictitious debts, — to reservations of property in favor of the assignor or his family, which have been adjudged, as indicative of a fraudulent design upon the rights of creditors, to have such an effect. No precedent can be found, however, which has applied the harsh and sweeping remedy of the statute to such a case as this; and our common sense recognizes a plain distinction between honest things which one may be incompetent to do, and dishonest things which no one ought to do, — between a secret, or even an open, attempt of a debtor to deprive his creditors of what is justly theirs in favor of himself or his, and

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an effort on his part in applying all his property to their benefit, to endeavor to do general equity between them, by placing those who have released him in the hope of payment, and are unpaid, upon the same footing with those who have neither released nor been paid.

At the argument it was urged upon us as decided, that any attempt whatsoever on the part of an insolvent assignor, though made without disguise in his assignment, to apply a portion of his property to the benefit of *others*, no matter whom, so that they were not in a legal sense his creditors, made the whole assignment fraudulent and void. Without doubt, general expressions may be found in some of the cases which will bear this construction, if, as we have no right to do, we divorce the phrases of a judge from the connection in which he uses them, and do not, according to the received rule, limit their meaning by the state of facts of which he is speaking. Such phrases are quite satisfied by applying them to reservations of property for the benefit of the assignor, or of his family, or of some mere volunteer to whom in no sense could he suppose himself indebted, without pressing them so far as to embrace cases of open and honest excess of power in adjusting the relative claims of those who were the assignor's creditors when he first went into insolvency. But if this were otherwise, the astuteness of judges of other states to find fraud in, and avoid, because contrary to the general policy of their law, assignments with preferences made by insolvent debtors, would furnish no guide to us, when the policy of our law sanctions and upholds such instruments. Our statute of fraudulent conveyances was plainly designed, looking at the terms which it uses, to apply only to cases of actual covin and deceit, and not to that large class of constructive frauds with which, as a court of equity, we may deal in a very different manner from that which the statute, when it applies, permits us to do. The root and branch work which the statute makes, in the former class of cases, differs very materially from the pruning and paring process of equity, in the latter. If other courts choose to ignore this distinction, or so to construe their statutes of fraudulent conveyances as to bring within them cases of constructive as

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well as of actual fraud, we nevertheless feel at perfect liberty to recognize it, and construe our statute according to the obvious intent of the legislature. There is a wide difference between an honest excess of power and fraud, which no casuistry can confound. The clauses of an instrument which are impotent, for the former reason, may, if fairly separable from the rest, be cut out as dead, and the living parts be left in undiminished vigor; but fraud, in any part, taints and corrupts the whole conveyance, and by force of the statute renders it "clearly and utterly void."

We do not regard the objectionable feature in this assignment, which we are considering, as indicating that the instrument, or any part of it, was contrived of fraud, covin, collusion, or guile, to defeat or hinder the creditors of the assignor in the collection of their debts, but, rather, as indicating an honest but unwarranted design on the part of the assignor, to apply a portion of his new succession towards his debts of moral obligation, along with, and as if they were debts also of legal obligation. We will not be the first to bring such a case within the range of the statute against fraudulent conveyances; but whilst we hold the application to be void for want of power in the assignor to make it, shall hold the assignment, which in other respects is accordant with the policy of our law, to be valid, as free from all taint or suspicion of "covin, collusion, or guile."

The result is, that we grant the motion that the defendants be restrained from further prosecuting their levy upon the trust property, and instruct the assignee to apply no portion of the trust funds to the payment of claims which have been released by act of the claimants.

Decree accordingly.

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SAMUEL AMES v. THOMAS R. HAZARD.

If a plea, justifying a libel which contains distinct things, may justify a part only, it will, at all events, be bad on general demurrer, if where the libellous matter be all charged in one count, it do not deny or justify the whole libellous matter so charged, or do not justify all the charges in the libellous matter which it professes to cover.

CASE, for libelling the plaintiff in his office of chief justice of the supreme court, and reporter of its decisions.

The declaration, which consisted of a single count, alleged, in the usual form, the publication by the defendant, of and concerning the plaintiff in his said offices, of the following libellous matter, relating to his connection with, and report of, the suit in equity—*Robert H. Ives v. Charles T. Hazard & others*—reported in 4 R. I. Rep. p. 14:—

“On perusing this report I find it based on a statement of alleged facts, which, whether true or false, are alike entirely foreign to any charges preferred in the complainant’s bill, or legal issues in any manner involved in the case reported upon. At the same time they are so ingeniously interwoven in the text, and apparently sustained by the recognition of points submitted by the counsel for the complainant, that the most wary mind, unacquainted with the real merits of the suit, can scarcely fail of being deceived by their perusal. Indeed so flagitious is the character of the text of this alleged report of the supreme court of this state, that I could not fully persuade myself that it was a genuine document, and on that account delayed commenting on some passages in your communication until I could have access to the ‘forthcoming volume’ of Rhode Island Reports, some of the contents of which you seem to have enjoyed the privilege of anticipating. My scepticism on this point was a good deal strengthened upon being further assured by eminent counsel that it was impossible that such a report could emanate from a judicial tribunal conversant with the case. I find, however, by reference to the 4th volume of Reports that has at length made its appearance, that the document is genuine, and that the supreme court of Rhode Island

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has by some means, or from some cause been induced to sanction and publish in the judicial report of its proceedings, charges of the most infamous character against the defendant, of which he was not accused in the bill, and which are wholly unwarranted and unsupported by any legal allegations or testimony whatever: meaning, that the plaintiff, in his office as reporter of the decisions of the supreme court of Rhode Island, had stated in his report of said suit in equity, facts foreign to the cause of action, and calculated to mislead those not acquainted with the case, as well as charges of the most infamous character against Charles T. Hazard, one of the defendants in said suit in equity, wholly unsupported by any legal allegations in the pleadings, or by any testimony in the case."

"How far the subsequent translation of your senior counsel to the seat of the chief justice of the court, and his appointment as reporter of his decisions, has influenced the language of the published report, remains to be shown; but I am bold to say that it affords about as pretty a specimen of unprincipled special pleading as can be found upon record: meaning that the plaintiff, influenced by his relation as counsel to said R. H. Ives, had availed himself of his offices as chief justice and reporter as aforesaid, to cause to be made and published an unfair and unjust report of said suit in equity, and in making said report had resorted to unprincipled special pleading."

"What kind of testimony the opinion of the court, as above expressed, is based upon, neither the defendant, C. T. Hazard, nor the public would probably have ever known any more than the victims of the Holy Inquisition in the dark ages knew of the testimony upon which that secret tribunal condemned them to the rack or the stake, were it not that your senior counsel and devoted friend, a citizen of the highest standing in our state, and a man of singular piety and candor, had been elevated to the supreme bench, and reporter of the court's opinions. For this and other kindred favors, allow me to tender him, through you and all truth-seeking citizens of the state, my unfeigned thanks; meaning by said ironical language, that the plaintiff in his offices aforesaid as chief justice, and being influenced by his former relation of counsel for R. H. Ives, had caused to be

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published in his report of said suit in equity, a statement of facts as a basis for the opinion of the court which was not relevant to the case."

"Beginning with your brother's irrelevant deposition, we find the burden of both your opening and closing argument confined to this slanderous accusation, and now that the senior member of your counsel has been translated probably through you and your clique's contrivances to the chief justiceship of the supreme court and reporter of its decisions, we find this same atrocious libel foisted into the text of the opinion of the court, in almost the same words that were used by the chief justice when acting as your counsel: meaning that the plaintiff, in his offices aforesaid, being influenced by his relation of counsel to said R. H. Ives, had caused an atrocious libel and scandalous accusation to be foisted into the report of the decision of the supreme court in said suit in equity."

"Thanks to the circumstances that have compelled you at so early a stage in the contest between might and right to hazard your cause on one and the last cast of the die: for as the great Napoleon never sent his *old guard* into the fight until every other expedient to turn the tide of battle had failed, so I am sure that Robert H. Ives, a greater *tactician* than he in the art of law if not in war, must have exhausted every other means of deception, before he ventured on the audacious expedient of exorcising from the supreme court, a documentary shield for his protection, partaking so far as truth and its judicial character are concerned, of all the elements of a gross forgery. I know that this is a grave charge to prefer against a body of men whose ermine should, from the nature of their office, be pure and unsullied, even from the suspicion of partisan bias, but still I will maintain the charge, and pledge myself to sustain it to the satisfaction of a majority of the legislature of this state if necessary, in spite of all the dust that may be sought to be thrown in their eyes, by the swarm of debauched members of the bar that so generally infest its halls, and who as a body have of late proved themselves to be the abject slaves and lick-spittles of wealth and of a self-constituted tribunal, rather than the advocates and supporters of justice and the laws; but who,

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had they a tittle of the honorable sentiment and chivalrous impulses that once distinguished their profession, would rise to a man, and demand the instant and ignominious expulsion from the supreme bench, of the man or men, who have so irreparably disgraced their position and the state, by causing to be inserted in the published judicial records, atrocious calumnies affecting to all time the reputation and standing of a plundered and grossly abused man, alike false in fact and unsupported by a tittle of evidence legally before the court, and which were they true, are wholly inapplicable to the case at issue. This was doubtless the document you relied upon to overawe the deliberations of the committee appointed by the house to report upon the merits of C. T. Hazard's memorial, and the equity powers of the supreme court. We here behold the same old cry of 'breach of trust' thundered into the ears of the committee, under sanction of the authority of a court who have not scrupled to incorporate in the report of their opinion in the case of *Ives v. Hazard*, whole sentences bearing unmistakable evidence of having been copied almost verbatim from the arguments of your counsel, or from your own statements, and which it requires nothing but a recurrence to original documents in possession of the court to prove to be grossly *false*: meaning that the plaintiff, in his offices aforesaid, being influenced by the said R. H. Ives, had issued a report of said suit in equity, partaking of all the elements of a gross forgery, and that the plaintiff in his aforesaid offices had disgraced his position by inserting in said report atrocious calumnies affecting to all time the reputation and standing of said Charles T. Hazard, and to convey to the public a favorable but untrue impression of the case of said Ives."

"What next? Ah yes, I understand you, the 'old guard' is still in reserve—your last appeal as usual is to authority—to *your counsel, law-maker, law administrator, and reporter of his own decisions*, all in one: meaning that the plaintiff, in his offices aforesaid, was ready to act, and did act as the aid and assistant of said R. H. Ives."

"Instead of looking for the truth as they might readily have found it in the original document in their possession, the court

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have evidently taken it second hand from your counsel's opening argument (page 7th,) in which the reporter, I mean counsellor, says, (speaking of Hazard's letter,) 'In it after alluding to a purchase which he just effected as AGENT for Mr. Ives, from a third person,' &c.: meaning that the plaintiff in his offices aforesaid of chief justice and reporter, being influenced by his relation of counsel to the said Robert H. Ives, inserted in his report of said suit in equity a statement taken from the argument of counsel and contradicted by original documents placed before the court, and thereby falsely represented the contents of a certain letter of said Charles T. Hazard, to the injury of said Hazard."

"Now the papers of the case show that you not only had 'an interview,' but 'interviews,' and that you likewise employed agents to have interviews with her, and also that the 'Old Guard' sent an agent to have interviews with her before the issuing of the court's final decree, with positive orders to see if 'a release could be obtained' from (*blank*,) '——— the wife of the said Charles T. Hazard, in favor of Robert H. Ives,' and in case 'she should PERSIST in refusing to release the same' 'make an allowance out of the stipulated price for the wife's dower:' meaning that the plaintiff in his offices aforesaid of chief justice and reporter, being influenced by his former relation of counsel to the said Robert H. Ives, had endeavored to influence by his official position the wife of the said Charles T. Hazard, and thereby to obtain from her some concession in favor of his former client, the said Robert H. Ives."

"There was not a particle of either legal or illegal testimony before the court to even hang a suspicion upon, that the wife of Hazard ever consented or offered to sell her rights of dower in the Peckham farm. And our self-constituted court of equity possessed no more legal right to beset her in her husband's house, with their whipper-ins, in order to compel or intimidate her into releasing her right of dower in favor of Robert H. Ives, than the same tribunal has authority to dispatch its presiding judge on a mission to Buckingham palace to 'examine' Queen Victoria, 'and inquire' whether she will or will not 'consent' to place the court's dictatorial ambassador at the head of the

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criminal bench of her realm on the ground of his fancied resemblance in aspect and disposition to the renowned Jeffreys, and in the event 'she should persist in refusing to (confer) the same,' then, in that case, the alleged descendant of King James' blood- and brandy-swilling chief justice should by virtue of the court's authority compel her royal husband to make 'such an allowance' out of their highness' privy purse as he might think expedient, as a penalty for the persistant obstinacy of his little Queen: meaning that the plaintiff in his office of chief justice used his official position, to intimidate the wife of said Charles T. Hazard and to compel her to release her rights of dower, and that the plaintiff was a cruel and drunken judge, and in action and conduct like Judge Jeffreys, a well-known drunken and infamous English judge of the time of James II., king of Great Britain, England and Ireland."

"At the time the case alluded to was decided, the court was composed of justices Staples, Brayton, Bosworth and Shearman. We think, however, the final decree from some unexplained cause was not issued until after chief justice Staples was superseded by lawyer Ames, who acted as the plaintiff's counsel, the decision therein being pronounced, as far as we can discover, minutely in every particular as it was asked for by lawyer Ames, which probably has led to the misapprehension by the writer in the Transcript: meaning that the plaintiff in his office as chief justice had influenced the final decree of the court in said suit in equity, and had caused and procured an opinion of the court therein in conformity with his argument while at the bar, by using his influence or authority as chief justice for that purpose."

To this declaration the defendant filed two special pleas, and the general issue.

The first special plea was: "And the said defendant comes and defends the wrong and injury, when, &c., and as to the following alleged libellous matter set forth in the plaintiff's declaration, namely," (here the plea recited the matter alleged in the declaration to be libellous, "On perusing this report," &c., and ending, "my unfeigned thanks,") "the said defendant says, that the plaintiff aforesaid, his action aforesaid, thereof against

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him ought not to have or maintain, because he says, that the plaintiff aforesaid, in his capacity of reporter as mentioned in the plaintiff's declaration, in his report of the suit in equity mentioned in said declaration, made a statement in the words and figures following, namely : " (here the plea recited the report of the case, as contained in 4 R. I. Rep. 14, from the beginning down to the statement of the points made by the counsel,) " upon which statement, the report aforesaid was based, and in which report the said plaintiff, in his capacity as reporter as aforesaid, represented and alleged that the facts set forth in said statement formed the basis upon which the report aforesaid, and the decision of the court in which said suit was pending, were based; some of which said alleged facts were entirely foreign to any charges preferred in the bill of complaint mentioned in said declaration, and to any legal issues, in any manner involved in the suit in equity aforesaid; and which were by the plaintiff, in his said capacity of reporter, so interwoven in the text of said report, and apparently sustained by the recognition of points submitted by the counsel of the complainant in said suit, that persons unacquainted with the real merits of said suit would be likely to be deceived by the perusal thereof: wherefore the said defendant, at Providence, in said county, at the time mentioned in said declaration, composed and published, and caused and procured to be published the alleged libellous matter above set forth, as he lawfully might for the cause aforesaid; and this he is ready to verify," &c.

The second special plea, as to the same portion of the libellous matter charged in the declaration which was covered by the first plea, alleged, that " the said plaintiff his action aforesaid, thereof against him, the said defendant, ought not to have or maintain, because he saith, that the report mentioned in said declaration made by the plaintiff in his capacity of reporter, as is mentioned in said declaration, contained, among other statements, certain statements of alleged facts, in the words and figures following, that is to say : " (here the plea recited portions of the statement of facts in said report, and a portion of the second point, as stated in said report, taken by the counsel for the complainant as to fraud and surprise,) " upon each and all of

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which statements aforesaid, the report aforesaid was based, and each of which said statements was foreign to any charges preferred in the bill in said suit, and to the legal issues involved in the same; and the charges made in and by said statements against the said Charles T. Hazard were in fact wholly unwarranted and unsupported by any legal allegations or testimony in said suit, and in relation to which no accusation was made against him in said bill of complaint, while the said statements were so interwoven in the text of said report, and so apparently sustained by the recognition of points submitted by the counsel for the complainant in said suit, that persons unacquainted with the real merits of said suit would be likely to be deceived by the perusal of said statements. Wherefore the said defendant, at the time mentioned in the plaintiff's declaration, at said Providence, did compose and publish the supposed libellous matter hereinbefore mentioned, which he lawfully might do, for the cause aforesaid; and this he is ready to verify," &c.

To these special pleas the plaintiff demurred, generally, and joined in the general issue.

Payne, with whom was *B. R. Curtis*, of Boston, in support of the demurrer.

1. The pleas do not profess to answer the whole declaration.
2. They do not answer that portion of the declaration which they profess to answer. To say that a statement of facts was entirely foreign, &c. [read the plea] is one thing; to say that the same statement is, &c. [read the libel] is quite another thing. Then, that portion of the declaration professedly covered by these pleas contains libellous matter, to which no answer whatever is made by either plea. The defendant cannot be allowed to limit the controversy, and tone down his original slander. If he attempt to do it, the plaintiff, though in fact he knows the plea to be libellous and false, must admit its truth by demurrer, as the only means of compelling the defendant to answer the declaration either by denying that he published the libellous matter, or by admitting the publication, and proving its truth. The justification must be of the specific charge in the declaration, and it must be as broad as that charge is. If it go beside it or fall short of it, it is naught. It must be in point of law identical with it. 1 Am. Leading Cases, 163, and cases

cited; *Edsall v. Russell*, 6 Jurist, 996; 2 Har. Dig. 2433-4; *Helsham v. Blackwood*, 5 Eng. L. & Eq. 409. To determine whether the matter is libellous, and to ascertain the meaning of any part, the whole written or printed matter of which the alleged libellous passages form a part, may be read in evidence to the court or jury. 1 Am. Leading Cases, 128-136, 142, 148 and cases cited; 2 Starkie on Slander, 85, 320 and cases cited; *Commonwealth v. Kneeland*, 20 Pick. 206, 216; *Graves v. Waller*, 19 Conn. 90.

J. M. Blake, in support of the pleas.

1. The alleged libel contains distinct things; and in such a case the defendant may plead in justification of any of them, and need not justify all. 1 Stark. on Slander, 490; Cooke on Defamation, 119; *Fero v. Roscoe*, 4 Comst. 162.

2. The pleas answer the substance and foundation of all that part of the declaration which they profess to answer, and that is sufficient. Cooke on Defamation, 117; 1 Stark. on Slander, 483; *Morrison v. Harmer*, 3 Bing. N. C. 759; 32 Eng. Com. L. R. 320; *Edwards v. Bell*, 1 Bing. 402; 8 Eng. Com. L. R. 360; 1 Chitty's Plea, 455.

3. If the defendant justify specially, it will not be necessary for him in his plea to deny the innuendoes and epithets contained in the declaration. Stark. on Slander, 476; Cooke on Defamation, 114; *Astley v. Younge*, Burr. 807.

4. A plea of justification carries with it a justification of a fair comment upon the facts which it specifies, and whether the comment raises an imputation which may or may not be a just inference therefrom, is a question for the jury. Cooke on Defamation, 123; *Clark v. Taylor*, 2 Bing. N. C. 654; 29 Eng. Com. L. R. 445.

BOSWORTH, J. The questions now before us, in this case, arise upon a general demurrer to two special pleas, filed by the defendant. The declaration alleges the publication of a libel by the defendant of and concerning the plaintiff, in his office of reporter of the decisions of the supreme court, and in his office of chief justice of said court.

The pleas filed are special pleas in justification. The causes of demurrer assigned are, that they do not profess to answer the

whole declaration ; and that they do not answer that portion of the declaration which they profess to answer.

The first ground alleged for cause of demurrer is answered by the defendant, by saying, that the alleged libel contains distinct things ; and that, in such case, the defendant may plead in justification of any of them, and need not justify all. The authorities cited by the defendant seem to sustain him in this position ; although their legal soundness is denied by several eminent judges in this country, and the decisions of courts of high authority are based upon a precisely opposite doctrine. In *Sterling v. Sherwood*, 20 Johns. Rep. 206, Chief Justice Spencer, in reference to the position on this subject laid down by Mr. Chitty in his 1st vol. of Pleading, and by Sergeant Williams, (Saunders 1, 28, n. 3), says, that it is not law ; and that the cases referred to in support of it, do not bear out the proposition ; and there are several cases which are directly opposed to it. He says, that the true rule is laid down by Kent, J. in *Riggs v. Dennison*, 3 Johns. Cases, 205, thus : " That as the plea did not, either by denying or justifying, meet the whole matter or gravamen contained in the count, it was for that reason bad. In a note to the text of Chitty on Pleading, 7th American edition, vol. 1, p. 555, it is stated, that in England, if a plea begin as an answer only to a part of the declaration, and is in truth only an answer to part, the plaintiff must take judgment of the part unanswered as by *nil dicit*. Here a general demurrer to such plea is sustained. This is a fatal defect." So it was decided in *Sterling v. Sherwood*, before referred to, and in several other cases quoted in the note to Chitty.

On the ground of the second alleged cause for demurrer, we think the pleas in this case are certainly bad. That a plea in bar must answer that portion of the declaration which it professes to answer, is a rule not controverted. The rules of pleading, in a case of libel or slander, require that a plea of justification must contain a specific charge, set forth with certainty and particularity ; and that the plea must be as extensive as the imputation complained of in the declaration. In order to determine what is the extent of the imputation, we must look at the whole language which the plea professes to justify.

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If a plea justify everything that is essential, it will be a good answer; but if it justify that part of the alleged libellous matter which is comparatively unessential, leaving out that part which gives a sting to the whole, it must certainly be adjudged bad. Upon examination of the declaration in this case we are of opinion, that the substance of the libellous matter set out in the declaration is unanswered by the pleas. The substance of the libel charged, is, as we think no one could fail to gather from a perusal of it, that the plaintiff who had been counsel of Robert H. Ives in the case of *Ives v. Hazard*, had in his capacity of reporter, after he had been promoted to the office of chief justice of the court, with the purpose of benefiting his former client, and injuring the defendant in the case, made an irrelevant statement of the case, calculated to deceive; and in making the report had resorted to unprincipled special pleading; making infamous accusations against the defendant Charles T. Hazard, unsupported by allegations in the bill or by legal proof in the cause; that the text of the report was flagitious in its character, and that the plaintiff had prostituted his offices to the baseness of those purposes and acts. This we understand to be the fair import of that part of the libellous matter set out in the declaration which these pleas profess to answer. The first plea sets out the statement of facts as published in the 4th vol. of R. I. Reports, and alleges that some of the statements therein are foreign to the charges in the bill or the legal issues in the cause, and are so interwoven in the text, and apparently sustained by points made by the counsel of the plaintiff, that persons unacquainted with the case are likely to be deceived by their perusal. This answer comes very far short of an answer to the charge made. The charge of unprincipled special pleading, of making a flagitious report, of making infamous accusations, is a very different matter from that of making some irrelevant statements so interwoven in the text as that those unacquainted with the merits of the case would be likely to be deceived by a perusal of them. The one might naturally be the result of inadvertence or carelessness, or might be a true report of a trial; the other imports malice of purpose and baseness of conduct. The second plea differs from

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the first in reciting, in addition to the statement of facts, some of the points made by counsel in the case, and alleging that each and all of the statements therein are of the nature set out in the first plea, and that all of the charges made in and by said statements against said Charles T. Hazard, were unsupported and unwarranted by any legal allegations or testimony in said suit. No charges against the said Charles T. Hazard are particularized, nor does the plea state that there are any of a character such as the libellous matter imports.

In both pleas the most disgraceful part of the alleged libellous matter is entirely unnoticed. If the matter stated in them can be proved to be true, and if they can be adjudged a sufficient answer, the result would establish, that a man might make a statement of another and so characterize it as to make it import the deepest criminality, and then, by pleading the truth of the statement without its criminal character, shield himself from all liability. In effect such a mode of justification would enable a defendant to a charge of libel, to say to the plaintiff, "true, I published what you charge me with publishing, but a part of it is true, and therefore I am justified of the whole."

For these reasons the demurrer must be sustained and the pleas overruled.

JOSEPH McCULLOCH v. WILLIAM E. DODGE & another.

The time of redemption of a tax title, accrued under the act contained in the Digest of 1844, is not enlarged from six months to one year by the act of March 13, 1855, contained in the Revised Statutes of 1857; the proviso in the repealing clause in the latter act expressly saving all rights vested under the former act.

Where the time of redemption is past, if the owner of an estate sold for taxes would avail himself of a waiver of the tax title, made on condition that he would on a day certain exhibit proof of his ownership and former right to redeem, he must comply with the condition before he can avail himself of the waiver.

Upon a mere bill to redeem a tax title upon the ground that the tender required by the statute had been made within the legal time of redemption, the complainant can have no relief upon the grounds, that no tax was assessed, or that the tax was illegally assessed, or that the person who acted as collector of taxes was not collector, or that the sale was void, or the deed void, although the bill speaks of the sale as made by a per-

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son who *assumed* to be collector, and of the assessment and sale and deed as *pretended*; the bill not seeking relief upon these latter grounds, and containing no specific allegations fitted to them.

THIS was a bill in equity to redeem three lots of land in North Providence, near the village of Pawtucket, which had been sold by the collector of North Providence for non-payment of taxes assessed thereon against one Hugh Maxwell, under whom the complainant claimed to derive title; the defendant, Dodge, being the purchaser of the lots at the collector's sale, and the defendant, Brown, a grantee of the same from Dodge. The sale took place on the 27th day of December, 1854, on which day the collector's deed to Dodge bore date. Dodge's deed to Brown bore date on the 5th day of September, 1855. The allegations of the bill, and the facts proved are sufficiently stated in the opinion of the court.

T. A. Jenckes, for the complainant.

1. Every prerequisite of the statute, however unessential and unimportant, relating to the levy, assessment, and collection of taxes, must be complied with, in order to the validity of a tax title. *Blackwell on Tax Titles*, 81, 82; *Hawkins v. Kempe*, 3 East, 410; *Sumner v. Sherman*, 13 Verm. 602; *Brown v. Veazie*, 25 Maine, 359; *Little v. Thurston*, 3 Mass. 432. The law requires that taxes on real estate shall be assessed to the owners, and that separate tracts or parcels shall be separately described and valued, as far as practicable. Rev. Stats. ch. 38, § 4. It is stated in the bill, and admitted in the answer, that the land in question was divided into parcels, numbered 7, 8, and 9; but there is no allegation or shadow of pretence that the land was assessed and valued in the manner required by this section. This prerequisite is indispensable to the validity of the tax. *Blackwell on Tax Titles*, 130, 183; *Thurston v. Little*, 3 Mass. 429.

Again, the statute requires that the collector shall give notice of the time and place of sale in some newspaper printed in the town, if there be one, and if none be printed in the town, then in some newspaper printed in the state, for the space of three weeks. Rev. Stats. ch. 40, § 11. Such advertisement is a prerequisite under the statute to the validity of a tax title. *Black-*

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well on Tax Titles, 253, 254 and cases cited. It is not in any manner alleged or pretended that the sale in the present case was advertised in the manner thus prescribed.

2. There is no *proof* that any of the statute prerequisites to the validity of a tax sale have been complied with; the general allegation of the answer, that all requisites had been complied with, being no proof, and the *onus probandi* resting upon those who claim under a tax sale. Blackwell on Tax Titles, 94.

3. The assessment of the tax was void, being signed by but three out of the seven assessors appointed. Blackwell on Tax Titles, ch. 3, § 7.

4. In such a case, there being no adequate remedy at law, the proper relief is in equity, in order that the cloud cast upon the complainant's title by this void tax title, may be removed. *Yancy et al. v. Hopkins*, 1 Munf. R. 410, 437; *Corporation of City of Washington v. Pratt et al.* 8 Wheat. 681; 9 Ib. 838, 846; *Hamilton v. Cummings*, 1 Johns. Ch. R. 517; *Apthorp v. Comstock*, 2 Paige, 482; *Petit v. Shepherd*, 5 Ib. 493; *Grover v. Hugell*, 3 Russ. 432; *Hawkshaw v. Parkins*, 2 Swanst. 546.

5. The objection to the jurisdiction of the court, the respondents having answered the bill, and the court being competent to relieve, comes too late. *Grandin et al. v. Leroy & Smith*, 2 Paige, 509; *Ludlow v. Simond*, 2 Caines Cas. in Error, 1, 40; *First Cong. Soc. &c. v. Trustees, &c.* 23 Pick. 148; *Underhill v. Van Cortlandt*, 2 Johns. Ch. R. 369; *Livingston v. Livingston*, 4 Ib. 290; *Bank of Kentucky v. Schuylkill Bank*, Parsons Eq. Cas. 222.

Burges & Brownell, for the defendants.

1. The estate was rightfully taxed to Hugh Maxwell.

2. It was rightfully sold by the collector for the non-payment of taxes.

3. There was no offer by the plaintiff to redeem, nor by any other person in his behalf, within the six months prescribed by the statute. Dig. 1844, p. 433.

BRAYTON, J. This bill, in its frame, is a bill to redeem from a tax title. The allegations of the bill are directed to this end, and the prayer of it is, that the defendants may be decreed to convey to the plaintiff, upon payment to them of the amount

by them paid, with twenty (20) per cent. in addition thereto, as the statutes provide, in case of sale for taxes.

Although it is alleged in the bill that the person who executed the deed to the defendant, Dodge, assumed and pretended to be a collector of taxes, that he made a pretended sale for the alleged purpose of collecting a tax alleged by him to have been assessed upon the estate by the assessors of taxes of the town of North Providence, and that a pretended collector had executed the deed, it is not alleged, nor anywhere stated, that no such tax was assessed, or that it was illegally assessed, or that Martin was not collector, and authorized to collect, and for non-payment, to sell the estate.

The bill assumes, therefore, that the tax was legally assessed, that Martin was the collector, that he regularly sold the estate for the payment of the tax assessed thereon, and alleges, that the plaintiff has tendered to the defendant, Dodge, the amount paid by him at the sale, with twenty (20) per cent. in addition thereto, and also made the same tender to the defendant, Brown, and demanded a reconveyance from each of them, which they refused, and for relief asks, that they may be compelled to convey upon payment of such sum; and the question is, if the plaintiff has established any right to redeem the estate now, upon payment? By the 36th section of the act regulating the assessing and collecting of taxes, Digest of 1844, page 433, it is provided, that in case of sale for taxes, the owner of the estate sold, his devisees and heirs, "shall have the right, within six months after the sale, to redeem the same, upon repaying to the purchaser the amount paid therefor, with twenty per cent. in addition." The bill alleges that the tender was made after the expiration of six months from the time of sale, and alleges no tender made at an earlier date, or any earlier request to be allowed to redeem. Although the act makes the estate in the hands of the purchaser defeasible until the expiration of the six months, it becomes absolute in him on the expiration of that time. Under this provision, the right of the plaintiff to redeem has become barred by lapse of time.

After the sale of this estate and the purchase by Dodge, viz. at the January session, 1855, the General Assembly passed a

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new statute regulating the assessing and collecting of taxes, containing new provisions, and repealing all other acts regulating the assessing and collecting of taxes. This act went into effect on the 13th day of March, 1855. By its 44th section, it was provided, that the owner might redeem from a tax sale, upon payment to the purchaser of the sum by him paid, with twenty (20) per cent. in addition, at any time within one year after the sale, or, if suit be brought involving the validity of the sale within one year, that he might redeem within six months after final judgment in such suit.

The repealing clause of this last act contains this proviso: — “that all rights, vested in any persons by virtue of any act hereby repealed shall remain unimpaired by this act, and all matters commenced by virtue of any act so repealed may be prosecuted and pursued to final judgment in the same manner as if this act had not been passed, and no new provision in this act shall affect any action or suit now pending, or judgment rendered.” The plaintiff claims that under this act the time to redeem is extended to one year after the sale, and as he tendered, and offered to redeem within that time, he is now entitled to this remedy. The proviso of the repealing clause is expressed in language too strong to admit the plaintiff’s construction; all idea of extending the time of redemption is so entirely excluded.

All rights vested under the repealed act are to remain unimpaired. The purchaser under the repealed act took the conveyance of the estate upon a condition that it should for six months be defeasible at the election of the prior owner, and to be absolute if he did not elect within that time. The right of the purchaser became vested under the former act, and is not to be impaired by restricting his rights, or enlarging those of the owner. But that no doubt might arise, it further provides, that all matters commenced under the repealed act, or which not being then commenced, might thereafter be commenced by virtue of the repealed act, should be prosecuted and pursued without reference to this act, and as if it did not exist. The plaintiff can therefore derive no benefit from the tax acts as they now stand in enlarging the time of redemption, but his

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right must depend upon the provisions of the repealed act. Though his bill was filed within one year, his right must be determined by the repealed act, by which the time of redemption is limited to six months after the sale.

The plaintiff urges, however, in order to relief under this bill, that there was a waiver of the forfeiture by Dodge, the defendant, after the expiration of the six months, and that the said Dodge, by his answer admits, that he expressly promised the plaintiff to release to him the tax title on repayment of the amount paid for the estate, with the twenty (20) per cent. additional. The bill sets up no such ground of relief. It is nowhere alleged that there was any waiver by either defendant, or any promise by either to convey, or any negotiation, correspondence, or conversation between the parties upon the subject.

The answer of the defendant, Dodge, so far as it relates to the redemption of the estate is, that the plaintiff was directed to call upon him, Dodge, on the 14th of July, 1855, and bring the evidence of his title, if he had any; that he did come on that day, but brought no evidence, and the defendant declined to give a deed until he brought this evidence of his title. As he could not then explain to the defendant what his title was, he was directed to call on the next Saturday, show his deed, and pay what the defendant had paid out in costs, and he, the defendant, would give him a deed back; but that the plaintiff being indignant and venting those feelings strongly, he, Dodge, in order to be relieved from the annoyance, told him, if he would then depart and come on Saturday next with his deed, he should have a release, and if they could not agree upon the terms he should have one without any agreement. The plaintiff promised to be there at the time appointed, but did not come at that time, nor did he again come until some time in September following. He then demanded a deed, and said he had a piece of gold; he, however, brought no evidence of his title, which the defendant insisted upon his producing. The defendant again refused to convey until evidence of title was furnished, but at the same time told the plaintiff to bring his deed, and twenty per. cent, and he should have the lot; but the plaintiff has never at any time produced any deed or evidence of title.

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The defendant's title, before the first interview with the plaintiff, had become absolute, and the right of redemption lost to the plaintiff. The defendant, however, might have waived his right, and have permitted the plaintiff to redeem after his right at law had become extinguished, but in doing so, he had the right to make his own terms, and to impose upon the plaintiff whatever conditions he chose for a reconveyance. In the exercise of his right he did insist, and always, that the plaintiff should first produce his deed,—show his title,—and furnish the defendant with some evidence that he was at some time entitled to redeem. This was not an unreasonable condition, and it might easily have been complied with by the plaintiff if he really desired a reconveyance, and that were his only object. But this condition he would never submit to. He steadily, and at all times, declined to accept the terms offered by the defendant,—refused to produce any deed,—to show any title, or to give any evidence that before the expiration of the six months, he had been entitled to redeem, or had any interest in the estate. There is no equity, certainly, to hold the defendant bound by a promise to the plaintiff which he refuses to accept. Before the plaintiff can claim the benefit, he must at least comply with the condition on his part. The tender, even, which he alleges in his bill is denied by the answer, and is not proved; so that he neither produces his deed, nor offers to pay, both which were conditions of a release by the defendant.

The plaintiff, however, claims relief here upon another ground, that the tax sale in this case is void, and the deed made by the collector is void,—conveying no title to the defendant,—and that while the deed of conveyance remains, it is a cloud upon the title of the plaintiff, and should be ordered to be cancelled, or a reconveyance ordered, and the cloud be removed thereby. As before suggested, there does not seem to be any foundation laid in this bill for this kind of relief. There is no statement in the bill that no tax was assessed, that it was illegally assessed, or that the assessment was void; that the person who acted and assumed to be a collector of taxes was not a collector of taxes, that the sale was void, or that the deed was void. In stating the pretences of the de-

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defendant the bill says, they sometimes pretended that the sale and conveyance was valid, notwithstanding the tender alleged in the bill to have been made. But the bill even here does not charge that what the defendant pretended was not true, much less does it charge the sale and conveyance to be void. The prayer of the bill admits the validity of the conveyance, and only claims that it was avoided and defeated by the tender made, and asks, not that the deed shall be declared to be void and surrendered up to be cancelled, but assuming the original validity of the defendant's title, asks that they may be decreed to reconvey the estate.

The plaintiff having failed to show any right to redeem, and there being no ground stated in the bill for any other relief, the bill must be dismissed with costs.

THE DEXTER LIME-ROCK COMPANY v. CHRISTOPHER C. DEXTER & others.

If the term "Dexter Ledge of Lime-Rock," used in a charter of incorporation as descriptive of the corporate property, has acquired a settled definite meaning in the community, as including certain lime-rock of definite extent, and excluding all other, such lime-rock only would be deemed to be intended by the charter, whatever might have been the general expectation of the corporators; and parol evidence is admissible to prove that the term had acquired such meaning.

If, however, the petitioners for the act of incorporation use the term, and expressly, or by plain implication, define its extent in their petition, such definition may be resorted to, to explain the meaning of the term in the charter.

The term "Great Hill or Ledge of Lime-Rock," in a deed, is to be construed, in order to ascertain its extent and limits, in the light of the circumstances attending the transaction, according to the intent of the parties, derived from the language employed by them, rather than according to geological notions, however correct, concerning the continuity and extent of the stratum of lime at the place referred to; and where the hill or ledge is described in the deed as "lying southerly from my dwelling-house," and another ledge is described in the same deed, "as lying easterly from said dwelling-house, and northerly from the driftway leading from said Great Ledge to the lime-kilns," the limits thus implied are to be observed, irrespective of the continuity and extent of the stratum of lime.

The representation of one tenant in common as to the extent of the subject of a joint conveyance by him and his cotenants cannot estop his cotenants from claiming according to their rights; nor can the representation estop him, unless acted upon by the purchaser.

BILL in equity to enjoin the defendants from quarrying lime-

stone upon their farm in Smithfield, commonly known as the Christopher Dexter farm, and for an account of the limestone already by them quarried there; the bill claiming that the complainants are the exclusive owners of the Dexter Ledge of Lime-Rock, so called, extending under said farm.

In 1761, John Dexter owned a large tract of land in Smithfield, containing a stratum of limestone, and in that year divided it into two farms, one of which, being the westerly part of said tract, he conveyed to his son Jonathan, and the other to his son William; each having, by the terms of the deeds, the free liberty to dig limestone for burning lime, in the land of the other. In 1804, the farm of William had passed by several mesne conveyances, embracing more or less of the right to dig lime-rock in both farms, to Christopher Dexter, and on the 31st day of March of that year, Jonathan conveyed to Christopher, "the full one half of all the great ledge or hill of lime-rock, situate in Smithfield aforesaid, on my homestead farm, and a little southerly from my dwelling-house, which I have or ought to have; together with one half of all the ledge of lime-rock lying easterly from said dwelling-house, and northerly from the drift-way leading from said great ledge to the lime-kilns, . . . always excepting and reserving to myself, my heirs, and assigns forever, all the scattering lime-rock which is or may be found on my homestead farm; and further, it is the meaning and understanding of this deed, that neither the grantor nor grantee aforesaid shall sell or dispose of any of the said ledges of lime-rock, without the consent or agreement of each other."

On the same day Christopher conveyed to Jonathan, "the full one half of all the great ledge or hill of lime-rock situate in Smithfield aforesaid, on the homestead farm of the grantee, and a little southerly from said grantee's dwelling-house, which I have, or ought to have, together with one half of all the ledge of lime-rock lying easterly from said dwelling-house and northerly from the drift-way leading from said ledge to the lime-kilns, . . . always excepting and reserving to myself, my heirs and assigns forever, all the scattering lime-rock, which is or may be found on my said homestead farm; and furthermore, it is the meaning and understanding of this deed, that neither the gran-

tor nor grantee aforesaid shall sell or dispose of any of the said ledges of lime-rock, without the consent or agreement of each other."

In 1854 the Jonathan Dexter farm had become vested in George L. Barnes, as trustee under the will of John Dexter, and in Francis G. M. Dexter, a minor, whose guardian was Israel Sayles; and the Christopher Dexter farm had become vested in Christopher W. Kelly, as assignee of Christopher C. Dexter and Amey Dexter, under a voluntary assignment for the benefit of their creditors; and in that year, upon their petition, the following act of incorporation was passed by the General Assembly:—

"An Act to incorporate the Dexter Lime-Rock Company.

Whereas, George L. Barnes, Trustee under the last will and testament of John Dexter, late of Smithfield, in the County of Providence, deceased, Israel Sayles, guardian of the person and estate of Francis M. G. Dexter, Christopher C. Dexter, and Amey Dexter, and Christopher W. Kelly assignee of said Christopher C. Dexter and Amey Dexter, all of said Smithfield, have represented to this Assembly that they are proprietors, in their individual and official capacities as aforesaid, of certain lime-rock in the following proportions, viz: The said George L. Barnes as trustee, one quarter, the said Israel Sayles, as guardian as aforesaid, one quarter, and the said Christopher C. Dexter and Amey Dexter and Christopher W. Kelly, as assignee, as aforesaid, one half, comprising, in the whole, all the Dexter Ledge of Lime-Rock, so called, situate in said Smithfield, and whereas they have represented to this Assembly that, owing to the various interests therein, the business of working the quarries, and of defining and appropriating to each proprietor his just and equal share is attended with difficulties which can be removed by legislative action, and have prayed the General Assembly to pass an act accordingly; Therefore,

"It is enacted by the General Assembly as follows:

"Sect. 1. The aforesaid proprietors are hereby formed into a company, by the name of the "Dexter Lime-Rock Company," and by that name shall be known in the law, sue and be sued,

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defend and be defended against before all courts, and in all places, and shall have power to appoint all necessary agents and officers, and to enact and pass all such rules, regulations and by-laws as they may deem expedient for effecting the object and purposes of said company and the business thereof, provided the same are not repugnant to the laws of this state or the United States.

“Sect. 2. The property in said lime-rock, and the proceeds thereof, shall forever be holden in three hundred and fifty-two shares; each proprietor shall have as many votes as he has shares, and no person owning less than one share shall be entitled to a vote.

“Sect. 3. The right and interest in said lime-rock may be disposed of by will, deed, or may pass by descent, and every future proprietor shall be a member of said company so long as he or she shall hold his or her right and interest in said lime-rock, and such proprietor, and also his or her right and interest, shall at all times, and in all respects, be subject to the provisions of this act, and to the rules, regulations and by-laws of said company, made pursuant thereto.

“Sect. 4. No present or future proprietor shall ever hereafter, by himself, his agents, servants, or lessees, dig, take, burn, or in any way whatever work or dispose of any of said lime-rock, or in any manner whatever interfere with the digging, taking, burning, working, or disposing of the same, but the said lime-rock, and the proceeds thereof, shall forever hereafter be holden, considered and managed as company property, and shall, at all times, be dug, taken, burned, worked and disposed of, and managed, in all respects, by the said company, and under their authority, pursuant to such rules, regulations and by-laws as said company shall enact and pass by two thirds of the votes of the proprietors.

“Sect. 5. Said company shall keep fair and particular accounts of all the lime-rock that shall be dug, taken, burned or disposed of by them, and under their authority, and of the proceeds thereof, and of all the expenses attending the same, and shall, once in every year, and oftener if thereto required by two thirds of the votes of the proprietors, make a dividend and dis-

tribution of the profits of the business among the said proprietors, in proportion to their right and interest therein, and said accounts shall at all times be open to the examination of the members of said company.

" Sect. 6. All executions that shall issue against said company shall be levied on said lime-rock, or on any other property, whether real or personal, belonging to said company.

" Sect. 7. Said company shall annually hold a meeting on the ——— in every year, and at such other times as they may judge convenient, and at such annual and other meetings may appoint agents and such other officers as they may deem necessary for the management of their business, and the members of said company may vote in said meetings either personally or by proxy.

" Sect. 8. The foregoing act shall be subject to all acts of the General Assembly, either in amendment or repeal thereof."

The Dexter Lime-Rock Company being thus formed, one hundred and seventy-six shares, out of the three hundred and fifty-two shares into which its property was divided, were by agreement set off to Christopher C. Kelly, assignee to C. C. Dexter and Amey Dexter, who conveyed them by several deeds, in parcels, to the present members of the plaintiff corporation, prior to October 28, 1856, on which day he reconveyed to his assignors all his remaining interest in the assigned property, including the Christopher Dexter farm, with such rights to the lime-rock underlying the same, if any, of which he had not been divested by his aforesaid conveyances.

Kelly's deeds of his shares in the lime-rock company recite in terms, that the capital stock of the company comprises, " The Dexter Ledge of Lime-Rock, so called, situated in said Smithfield, the engines, apparatus and implements for working the *quarries* and burning of lime, the kilns and appurtenances thereto appertaining, and all the lands formerly held by the late Christopher Dexter and John Dexter, in common, for the purpose of building kilns and depositing lime-rock, wood or other materials thereon, with all the rights, privileges and appurtenances in any way thereto appertaining."

The answers admitted, that the defendants, owners of the

Christopher Dexter farm, had quarried and were quarrying limestone underlying the same, being no part, as they claimed of the Dexter Ledge, so called;—the right to quarry which was admitted to be exclusively vested in the complainants.

Much testimony was submitted for the purpose of proving the extent and limits of what was called and known as the "Dexter Ledge of Lime-Rock," and concerning localities, and the working of the quarries by the former owners, which served to explain the descriptive parts of the deeds produced — and testimony was also submitted bearing upon the point of estoppel taken by the complainants; but as this is sufficiently stated in the opinion of the court, it is deemed unnecessary to recite it here.

Thurston, for complainants.

1. Parol evidence is admissible, to show the extent of the subject of a grant, where the language of the deed is not precise in defining its limits. *Doe v. Jackson*, 1 S. & M. 494; *Morrell v. Cook*, 35 Maine, 207; 1 Greenleaf's Evidence, § 365; *Seaman v. Hogeboom*, 21 Barb. 398; *Doolittle v. Blakely*, 4 Day, 265; *Atkinson v. Cummins*, 9 Howard, 479; 8 Bingham, 244. The term "Dexter Ledge of Lime-Rock," in the deeds of Kelly to the complainants, was the natural descriptive expression, signifying all the formation of that character upon the Dexter farms. No particular quarry or outcropping of lime-rock, on the Dexter farms, was ever known by the name of "Dexter Ledge." The principal localities from which the rock was taken, received special names, as the "Great Rock Hole," or "Great Ledge," and the "Little Rock Hole," or "Hackelstone Ledge," while, as above stated, the term "*Dexter Ledge*" was the comprehensive expression for the whole. Both the "Great Ledge" and the "Little Ledge," the one on the Jonathan, and the other on the Christopher Dexter farms, were, by the proprietors, after 1804, worked in common, and the rock taken from any place, on either farm, was called "Dexter Rock," and the lime burned from it was called "Dexter Lime."

2. Whenever the intention of the parties to a deed can be fairly ascertained, the court will carry it into effect if it can be

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done consistently with the rules of law. *Bridges v. Wellington*, 1 Mass. 219; *Marshall v. Fisk*, 6 Mass. 31; *Pray v. Pierce*, 7 Mass. 381; *Litchfield v. Cudworth*, 15 Pick. 23; *Swartz v. Swartz*, 4 Barr, 353; *Frost v. Spaulding*, 19 Pick. 446; *Wise v. Wheeler*, 6 Iredell, 196; *Irwin v. United States*, 16 Howard, 513; *French v. Carhart*, 1 Comsts. Appeal Cases, 96; *Winslow v. Patten*, 34 Maine, 25; *Lincoln v. Wilder*, 29 Maine, 169. It was the intention of C. W. Kelly, assignee of C. C. and Amey Dexter, to separate the lime-rock rights from the other estate of his assignors, and to convey the whole of the same to the complainants; at least he intended to convey all his interest in the lime-rock, which had been formerly owned in common by Jonathan and Christopher Dexter. The chief object of procuring an act of incorporation, was to make the property salable, and also to prevent the difficulties which had been invariably experienced from the interfering claims of part-owners. The property could only be made valuable and attractive to purchasers by ridding it of the possibility of being affected by a ruinous spirit of competition in the sale of rock, that would continue, if other quarries of the same kind of rock could be opened in the same vicinity on these farms. That the intention of the parties in procuring the act of incorporation and in making the sales to the complainants was, to carve out the lime-rock property from the rest of the estate, is conclusively evidenced from the conduct and declarations of C. C. Dexter at the time. Such acts and declarations estop the defendants now to deny that the lime-rock, which the complainants purchased, extends into the Christopher Dexter meadow. Story's Equity Jurisp. § 384 et seq.; *Pickard v. Sears*, 6 Adolph. & Ellis, 469; *Gregg v. Wells*, 10 Ib. 90; *Neville v. Wilkinson*, 1 Brown's Ch. Rep. 543; *Hobbs v. Norton*, 1 Vernon, 136; *Pearsons v. Morgan*, 2 Brown's Ch. Rep. 388; *Evroy and Nicholas et al.* 2 Eq. Cases Abridged, 488; *Stone & Brooks v. Baker*, 6 Johnson's Chan. 166; *Savage v. Foster*, 9 Modern Rep. 37; *Hunsden v. Cheney*, 2 Vernon, 150.

3. There can be no doubt, from an examination of the whole of the instruments, that Jonathan and Christopher Dexter, in 1804, intended to make all that lime-rock on the farm of either,

which was in the language of geology, "rock in place," common property. The language of the description in each deed, is capable of supporting the conclusion that each was aware that the ledge on the farm of the one extended into the land of the other.

"The full one half of *all* the great ledge or hill of lime-rock situate in Smithfield aforesaid, on the homestead farm of the grantee, formerly of Nathan Dexter, and a little southerly from said grantee's dwelling-house, *which I have or ought to have*, together with one half of all the ledge of lime-rock lying easterly from said dwelling-house, and northerly from the drift-way leading from said great ledge to the lime-kilns." Deed. *Christopher to Jonathan*. And the same description occurs in the deed of Jonathan to Christopher, with the omission of the words "formerly of Nathan Dexter," and the substitution of "*grantor*" in the place of "*grantee*." The act of incorporation, embraced at least all that Jonathan and Christopher previously held in common, unless the words "all the Dexter Ledge of Lime-Rock, so called, situated in Smithfield," are construed to mean only the "Great Ledge" on the Jonathan Dexter farm. Attempts to fix settled boundaries to the extent of the Great Ledge, have been unsuccessful; and the theory that the name "Dexter Ledge" came to be applied exclusively to the Great Ledge, is wholly unsupported. It follows, that the defendants can save the quarry opened by them from being covered by the complainants' title, only by showing, that the rock at that place comes within the term "scattering rock," as used by Jonathan and Christopher Dexter, and is no part of the ledges on their farms.

4. If the confined construction, contended for by the respondents, be given to the deeds of Jonathan and Christopher Dexter, putting in common only certain portions of the lime-rock underlying their two farms, — those who succeeded to the rights of Jonathan Dexter, nevertheless, are entitled to one undivided half of the lime-rock in the east, or Christopher Dexter farm, by virtue of the deed from Samuel, son of William, to Jonathan Dexter, dated May 24, 1783. This would leave Barnes, Sayles, and Kelly, when incorporated in 1854,

proprietors in common of the Christopher Dexter farm, in precisely the proportions named in the act of incorporation; and, necessarily, the defendants are infringing upon the complainants' rights.

Weeden & Blake for the respondents.

1. That if by continuation of lime-rock the plaintiffs mean merely similar strata without breach of subterranean connection, such continuation is of no avail for the plaintiffs even if their own view of the case were in other respects correct, because it is not a continuation of a great hill or ledge on the Jonathan Dexter farm, and is not "north of the drift-way."

2. If a legal title were established in the plaintiffs (which is however not admitted by defendants), to fractional shares in rock not included within the above limits, as tenants in common with the defendants, such title would not sustain the present suit; because one tenant in common cannot sustain trespass for, or injunction against, his cotenants, for a mere user of the common property, — a proposition too well established to need to be sustained by reference to authorities.

3. As to the title, or claim of title, offered by the plaintiffs, the defendants submit, at the same time denying the inference drawn therefrom by the plaintiffs; first, such inference, viz: that Christopher and Jonathan Dexter owned in unequal proportions the said lime-rock after, or at the time of, the execution of their reciprocal deeds of March, 1804, as rebutted by the language of the deeds themselves; second, said deeds, being reciprocal and concurrent and between the same parties, must be construed together, and would make each party equal owner whether he were so before the execution of the deeds or not, and would estop those holding under them from denying such equal ownership; and the present parties are further estopped therefrom, by asserting such equal ownership in the petition for their charter quoted in plaintiffs' brief, and by dividing the shares of the stock equally between the persons representing the Christopher Dexter farm, and the Jonathan Dexter farm.

4. Although the deed of assignment of Christopher C. and Amey Dexter conveyed all their estate, the said Kelly conveyed

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to the plaintiffs or their constituents only incorporated shares, carving them out from the estate; and his own construction of these conveyances is shown by his reconveying to the assignors all except the incorporated shares, with *warranty* against all claiming under him. His testimony as to any greater interest conveyed, or intended to be conveyed to the members of the company, or any less reconveyed to the assignors than the deeds import, would, if admitted, work a fraud upon the assignors, and particularly upon the defendants, the Walcotts, who are purchasers for an adequate consideration. For a similar reason, any declarations by parol made by Christopher C. with relation to the extent of the lime-rock conveyed or intended to be conveyed, even if made, (which is not admitted,) could not bind his co-owner, Amey Dexter, nor the present defendants, not privy thereto.

5. The construction claimed by plaintiffs of the deeds and documents in question, that the area of lime-rock granted included all such rock on both farms as is of similar or continuous strata, in the probable case that such underlies both farms, would, if not limited as the defendants insist, involve the granting of an *easement* in the fee coextensive with, and destructive of, the fee itself. That such an intention was entertained by any grantor, or understood by any grantee, certainly cannot be presumed, and indeed is insensible and absurd. The grantors in the deeds where scattering rock is reserved undoubtedly meant rock not included in the hill, or hill and ledge, as by them located.

6. The act of incorporation is the grant, and must be interpreted by the rules applicable to wills, or to any other grant or written contract; and where there is a subject-matter upon which a will or grant may take effect, construing the words in their ordinary sense, parol evidence is not admissible to prove that the words were used in a more comprehensive sense, or in *other words to extend the grant*. *Doe v. Lyford*, 4 M. & Sel. 550; *Miller v. Travers*, 21 Eng. Com. Law R. 288; 8 Bingham, 244; *Doe d. Oxenden v. Chichester*, 4 Dow. P. C. 65, 3 Taunton, 147; *Tucker &c. v. Seamen's Aid Society*, 7 Met. Rep. 188; 2 Starkie's Ev. 560, 924; *Doe d. Hiscocks v. Hiscocks*, 5 M. & W. 362;

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Jackson v. Sill, 11 Johns. Rep. 201. That there is no difference in the rules of interpreting wills and written contracts. 1 Greenl. Ev. § 287.

The complainants are not entitled to a *permanent* injunction, because their title has not been established at law; and not to a *temporary* injunction, because they have long neglected to take any steps for obtaining a decision at law in support of their title; and because the defendants are, and long have been, in possession, claiming title, and denying that the complainants have any title. *Pillsworth v. Hopton*, 6 Ves. 51; *Chesapeake & Ohio Canal Co. v. Young*, 3 Miller, 480.

BRAYTON, J. The right of the plaintiffs to the injunction which they ask depends upon their title to the lime-rock, locally situate on the land of the defendants, where they are now digging, and propose to continue digging lime-rock. If they establish their claim to the exclusive right to the rock, the defendants must be enjoined from further excavating, burning, or using the limestone there.

The right to the rock has never been conveyed to the corporation by deed executed by the owners of such lime-rock; but the plaintiffs claim, that the title to the premises in question vested in them by the act of incorporation, which declared what should be capital stock. The charter declares, that certain lime-rock shall constitute the capital stock, and that it shall be owned by the petitioners or corporators in the same proportion as they owned the rock at the time they petitioned. The question is, what was the extent of that lime-rock which was made capital stock, and as owners of which the petitioners asked to be incorporated. The plaintiffs say, that the corporate stock included all the lime-rock then upon either of the farms owned by the petitioners; that the intent was to include in such stock all the lime-rock, and the right to dig and take the lime-rock upon both farms which was held by the petitioners in common, and that it included the lime-rock at the defendant's present quarry.

The defendants say, that not only was no lime-rock upon the Christopher Dexter farm included, but that nothing was included and made corporate property by the act of incorpora-

tion, except the great ledge or hill of limestone ; and that was wholly upon the Jonathan Dexter farm ; that the petitioners prayed to be incorporated only as they were owners in common of so much lime-rock as was called and known by the name of the Dexter Ledge of Lime-Rock ; and that no other lime-rock was called or known by that name except the hill of lime-rock which did not extend into the Christopher Dexter farm, and the charter declares no other lime-rock to be corporate property.

Had the term "Dexter Ledge of Lime-Rock," as used in the charter, acquired a settled definite meaning, well understood in the community as including certain lime-rock of definite extent, and excluding all other, we should be obliged to hold that such lime-rock only was covered by the charter, and we could not consider any general intent of the incorporators to have included more, or to have included less. If the term so defined and settled had included the hill of lime-rock upon one farm only, the charter could have included no rock on the other farm.

In looking at the testimony submitted as to what was called or known by the name of Dexter Ledge of Lime-Rock, in connection with the language of the petitioners in their application for a charter, the defendants fail to satisfy us that the term Dexter Ledge of Lime-Rock was, in the contemplation of the parties, confined to the ledge on the Jonathan Dexter farm only, although the evidence shows, we think quite clearly, that that term was more generally applied to the great ledge or hill of lime-rock, and generally, to that ledge as the Dexter Ledge, yet that it was sometimes extended to the smaller, or Hacklestone Ledge.

It can hardly be claimed, if we regard the language of the petition and of the charter, that the parties to the act of incorporation intended to limit the charter to the great ledge. The language very clearly implies that they did not. The petitioners say, that they are the owners in certain proportions of certain lime-rock, comprising, in the whole, all the Dexter Ledge of Lime-Rock ; that they had experienced a difficulty in the business of working the quarries, and defining the just shares of each to the rock taken therefrom. They speak of quarries, in the plural, and not of one quarry only. There was at the

great hill or ledge but one quarry. There was another, and but one other, at the smaller, or Hacklestone Ledge. Both the quarries had been at some time worked in common. These quarries are spoken of in connection with the Dexter Ledge of Lime-Rock, and as parts of the Dexter Ledge which were owned in common. They must have understood that the rock at both pits was included in the Dexter Ledge, the difficulties in the working of which they desired to obviate by this legislative act.

The plaintiffs claim even more than the two quarries, and that the act of incorporation included all the lime-rock of the same formation as the rock at the quarries, to whatever point it might be continued, and that the term, Dexter Ledge, included all such rock, wherever it might be.

Our inquiry should naturally be, what was called and known as the Dexter Ledge of Lime-Rock? How extensive was the rock, called and known by that name? The plaintiffs have offered no evidence upon this point, except in rebuttal of that offered by the defendants to show that it was confined to the great hill of limestone. That which they did produce was merely to prove that no locality was known by that name; but it failed to prove that that term was ever used in the indefinite sense here claimed, as including all the rock of the same formation with that at the quarry opened. There is no witness who says this, or that the term was ever applied in fact to more than the two quarries thus open, the one on the Jonathan Dexter farm, the other on the Christopher Dexter farm, both of which had been worked by the Dexters, and owned in common by them. No witness says that it was ever applied to the Briggs Ledge, on the west part of the Jonathan Dexter farm. To determine, however, the extent of the plaintiffs' right to lime-rock on the Christopher Dexter farm, and whether it extended to the quarry opened by the defendants, it became necessary to determine the extent of the lime-rock owned by the parties to the act of incorporation, as tenants in common. The plaintiffs say that this is to be ascertained by the mutual deeds executed by Jonathan and Christopher Dexter in 1804; and the question arises, what interest passed to the respective

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parties upon the proper construction of these deeds. These deeds should be construed in the light of all the circumstances surrounding the transaction in order fully to understand the application of the language used, and determine the sense in which it was used. From the exhibits and proofs in the cause, it appears that one John Dexter, in 1761, was the owner of both these farms. He had, in 1753, leased for the term of ninety-nine years a portion of the great ledge or hill of lime-rock to certain parties, ten rods in breadth extending through the hill, and had in this lease reserved the right to dig lime-rock sufficient for the use of one kiln, then proposed to be built upon his own land. He covenanted not to dispose of any other lime-rock which might be obtained from the farm, to the injury of the lessees who had the right to dig and burn lime during the lease. John Dexter, in 1761, divided this farm into two parts, giving to Jonathan, his son, one of the parties to the deed of 1804, the westerly part, and at the same time granting the free liberty to dig limestone for burning lime on the other, or easterly part. On the same day he conveyed to William Dexter, another son, the easterly part, with like free liberty to dig lime-rock upon the farm given to Jonathan. The right and title of William Dexter seems to have passed by several mesne conveyances to Christopher Dexter, the other party to the deeds of 1804. In 1804, when these deeds were executed, there was a hill situated upon the westerly, or Jonathan Dexter farm, a little southerly of the dwelling-house, descending easterly and coming to the level before reaching the westerly line of the Christopher Dexter farm, and situate wholly on the Jonathan Dexter farm. This hill was composed of lime-rock, and was, according to the testimony of the witnesses, from thirty to forty or fifty feet above the general level of the land, and had been excavated extensively, some parts of it below the surface, and there was a drift-way leading from the place where the hill had been excavated, easterly, to certain lime-kilns upon the Christopher Dexter farm. To the eastward of the dwelling-house of Jonathan Dexter, and upon the Christopher Dexter farm, and north of the drift-way and coming up to the side of it, was an open quarry of lime-rock. This

had been excavated to a considerable depth below the surface ; and though the rock at the way rose to the surface, there was no elevation here of the land or of the rock. There was also upon the westerly part of the Jonathan Dexter farm another quarry of lime-rock, called the Briggs Ledge, which does not appear to have been worked at any time, by Christopher Dexter, or by his predecessors.

The plaintiffs claim, that by these mutual deeds between Jonathan and Christopher Dexter, Christopher Dexter conveyed to the said Jonathan one half of all the lime-rock upon his the said Christopher's farm which was what is termed by geologists "rock in place," as distinguished from boulders or detached rock removed from the place of its original formation ; that by the term, Great Hill or Great Ledge of lime-rock, situate on the homestead farm of the grantee a little southerly of the grantee's dwelling-house, all the connected rock of that formation of limestone passed, wherever it might extend, whether upon the grantee's farm, or upon land of the grantor.

The claim of the plaintiffs is founded upon the assumed sense in which the term, Great Ledge, was used in these deeds. They claim that it was used in the sense, and with the definition, of *layer*, or *stratum* of limestone, and therefore included all of the layer or stratum which is continuous and unbroken, of which the hill is part ; and as this formation extends into the Christopher Dexter farm, and under the meadow where the defendants are now working, the rock there passed also.

We may assume for this purpose, that the same formation extends from the great hill to the pit or quarry of the defendants, and we think the evidence shows that the rock in both places is of the same formation. But it does not aid the plaintiffs in the construction of the deed. If we substitute the definition of the word ledge, as claimed by them, for the term itself, we still meet with the same difficulties. We then have the one half of a great layer or stratum, or hill of limestone, upon the grantee's farm, a little southerly of his dwelling-house. Some significance must be given to the term "hill of limestone ;" for it is evidently used as synonymous with ledge, and as descriptive of the subject. If the parties intended to include

the whole formation, and to extend beyond the hill easterly and indefinitely, the word, hill, ceases to have any meaning, and must be rejected; and so we must also reject that part of the description which describes it as situate southerly of the dwelling-house; for this would give it a location easterly as well as southerly from the house, and include the smaller ledge which is described to be situated easterly; and we should be driven one step farther, that is, to reject that part which describes the lime-rock conveyed as being upon the grantee's farm. The description then would be simply, the one half of a great stratum or layer of lime-rock, without any locality,—a description so indefinite that parol proof alone could ascertain what was granted, or intended to be.

It is said, indeed, that the parties understood at the time that the formation at the great ledge extended into the Christopher Dexter farm and perhaps entirely across it, and included the smaller or Hacklestone Ledge also, and therefore it must be presumed that the parties intended to convey to each other all their property in the entire formation. They might well enough have presumed that the lime-rock at the great hill extended to the smaller or Hacklestone Ledge, for the distance between them was very small, and that they were both parts of the original formation, though the parties were probably little versed in geology, and it is at least doubtful if they were familiar with the term "rock in place," as used by geologists. There was less indication of lime-rock at the meadow where the defendants now work, or that the formation extended there, since no pit had been opened; and we cannot determine whether they did, or did not, have the opinion imputed to them as to the actual extent of this lime formation. But suppose they had. This does not relieve the difficulty, for the question immediately forces itself upon us, why should they, if they intended to convey the whole, use such description as is appropriate to a part only? Why use the term "hill" at all, or describe it as upon one farm only, when it was in fact upon both, or as southerly of the dwelling-house, when it extends far to the east, and even in that view most probably included the position of the dwelling-house itself? But the descriptive part

of the deed certainly leaves us to imply that the deeds were not made upon any such opinion. There were two subjects of grant in these deeds. The great ledge is treated as one, and the ledge situated easterly of the dwelling-house is treated as another, distinct subject. This last is situate (so the deeds say) north of a drift-way leading to the first, viz., the great ledge or hill of lime-rock; indicating that the great ledge was intended to be described, as local and including only lime-rock on the Jonathan Dexter farm, and not the lesser ledge, along the southerly side of which the drift-way led. And, upon the whole, we are driven to one of two conclusions, either of which is fatal to the plaintiffs' view; either, that they considered at the time the lime-rock at the great ledge, and that at the smaller ledge, easterly of the dwelling-house, as different formations, or else that they intended to describe and convey different and distinct portions of one entire formation; and it is quite immaterial which view be taken. This is the more apparent from the description given of the several subjects of grant. It is, one half of the ledge of lime-rock lying easterly of the grantee's dwelling-house, and northerly of the drift-way leading to the great ledge. By no rule of construction can this grant be carried south of the drift-way. It would be a perversion of terms to do so. The drift-way is to be the southern boundary of this second parcel of lime-rock, regardless of the extent of the formation of which it might be part.

The defendants on their part say, that the term ledge, as here used, includes the idea of prominence or projection, either upwards, when it is sometimes called a ridge, or projecting horizontally, —jutting out from,—and therefore the term is here used in the sense of *hill* or *elevation* of lime-rock; and so every separate hill, or elevation of lime-rock, may be termed a ledge, within the meaning of that term as here used by the parties. The description of the first subject of the grant evidently does include this idea of a prominence of rock; but in the description of the second subject the idea of elevation, or ridge of rock, is as evidently excluded. This locality had no prominence or elevation. It was on the general level of the land, and though the lime-rock originally came to the surface, and still did at the

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drift-way, it had long before been excavated far below the surface elsewhere. The term here did not mean hill, ridge, or elevation of rock, but simply a body of lime-rock, lying easterly of the house and north of the drift-way, — all the rock there. It is indefinite in extent, except that it does not extend west of the house or south of the way. It is difficult to give this term, ledge of lime-rock, as used in reference to both subjects of the grant, any other meaning than, a body of connected lime-rock, whether hill or valley or upon the general level with the land, and reconcile it with the language here used by the parties. The terms, great ledge or hill of lime-rock, must be construed to be, all that body of connected lime-rock locally situate southerly of the dwelling-house of Jonathan Dexter and upon his farm, and not extending beyond it easterly. But at the same time, the term, ledge, applied to the other subject of grant, since there are no words limiting it except the drift-way on the south, may be used in the larger sense, as including all the body of connected lime-rock upon the grantor's land which lies north of said drift-way.

This construction would not include the meadow south of the drift-way, and easterly of the Jonathan Dexter farm, where the defendants are now excavating rock. It has been suggested that by this construction no effect is given to the reservation contained in the deed, viz.: "always excepting and reserving to myself, my heirs and assigns, all the scattering rock which is, or may be found upon my farm;" and the plaintiffs say, that this reservation shows that the grantor did not design to retain to himself any of the rock in place, so called, but detached rock only, what geologists term boulders, rock removed from the original formation and separated from the mass of connected rock. It may be said in regard to this, what could not have escaped the notice of counsel, that in the extended sense which he would give to the term in the deed, as conveying all the rock in place upon the grantor's farm, the loose rock or boulders can in no proper sense be included. It is no exception to anything which could have passed by the general description in the deed; boulders could not with any propriety be deemed, in any sense, rock in place. Looking at it in this light, the exception

is simply inoperative, and that equally, whether the rock in place described in the deed be upon the grantee's farm only, or be extended into the land of the grantor. But it may be said also, what is apparent from this deed, that Christopher Dexter did clearly grant a connected body of lime-rock locally situate upon his own farm by the description, "ledge of lime-rock situate easterly of the dwelling-house and north of the drift-way." If the terms of the reservation are to be considered as excepting anything which could otherwise pass and as excepting part of the rock described, and "detached rock" is an exception from the grant of the ledge, full operation is given to the reservation in application to the rock granted north of the drift-way. It is said by the plaintiffs, in the argument, that the intent of these deeds was to make the parties equal as to their right to lime-rock on both farms. These deeds were made between father and son, and it would seem in anticipation of a conveyance by the father to another son, to whom he did convey his interest in 1809. At the time of the execution of the deeds, Christopher Dexter, the son, was the owner of the greater portion of the farm conveyed to William Dexter in 1761. It may be that he owned the whole. This is not made certain by the conveyances. The right granted to William Dexter to dig lime-rock from the western farm, if it vested in Nathan and Samuel, the sons, by the devise of the farm, had by the deed, of Nathan, in 1783, to Jonathan, become extinguished. Jonathan Dexter by the same conveyance acquired not a mere right to dig lime-rock, but a property in one half the lime-rock on the eastern farm, and in consequence thereof the mere right to excavate and take lime-rock from that farm, granted in 1761, became extinguished. The purpose of the deeds of 1804, as understood, and as the plaintiffs urge, was to define the rights of the parties, and to make their interest in the lime-rock equal; and it is apparent from the deeds themselves, that the equality was to be accomplished by vesting in the parties the property in the rock itself, and to make them tenants in common of all the rock in which they were to have an interest. To do this, some rights were to be created or granted anew, some to be released. That common interest in the rock on the western farm, designed

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to be vested in Christopher Dexter, was to be newly granted by the deeds, and the deed of Jonathan does convey one half of the great ledge of lime-rock on that farm, he reserving, and Christopher agreeing that he shall retain, all the scattering rock then apparent or to be thereafter found on that farm; and since no rock is included in the description except the great hill of lime-rock, this reservation is, in effect, of all other lime-rock on that farm. Without the reservation the effect would be the same. Christopher Dexter's deed purports to convey to Jonathan, one half of the ledge of lime-rock lying north of the drift-way on his farm. It is at least doubtful if this deed conveys to Jonathan any greater right to lime-rock on the easterly farm than he before had. The deed to Nathan Dexter made to him in 1783, purports to vest in him one half of all the lime-rock on that farm. By the deed of 1804, the grant, instead of being a grant of one half of all the lime-rock, is limited to one half of the ledge. By these mutual deeds Christopher Dexter reserves to himself, and Jonathan agrees that he shall retain to himself all the scattering rock which then was, or which might thereafter be found upon his farm,—in effect all other lime-rock upon that farm, except what was described and purported to be conveyed.

It is claimed, further, that the acts and declarations of Christopher C. Dexter, about the time of procuring the charter and in endeavoring to effect a sale of shares in the corporation, estop, not only Dexter himself but all the defendants, to deny that the lime-rock incorporated extended to the place where they are now excavating. These representations, as charged, consist in representing that the rock of the corporation extended under the meadow and under the whole farm of which he was part owner. If the other parties to this act of incorporation have been by representations of the defendants misled to their injury, and upon the faith of such representations have been induced to vest their money or their property in the stock of this company, and must now suffer loss unless such representations are held to be true, the general rule of law would require that the defendants should be estopped to deny that they were true.

The objection in his case is, first, that the representations

were not made by all the defendants or by all of the owners of the rock claimed, but by one tenant in common only, and the remedy asked cannot be given without at the same time doing an injury to the other tenant in common, who is not responsible for the representations made, it would be in effect compelling A. to make good B.'s default. There is another objection, that while Christopher Dexter, one of the defendants, was making the representations here charged, other members of the corporation, and who became such by virtue of their ownership of lime-rock on the western farm, were making representations of precisely an opposite character, that no lime-rock upon the farm was designed to be made corporate property except the ledges then worked, and that it was not intended to include other lime-rock. There is a third objection: that whatever the representations were which were made by C. C. Dexter, it does not appear that the corporation, or any member of the corporation, was misled by them, or ever acted upon them, either in applying for the charter, or in the purchase of stock in the corporation.

The plaintiffs, having failed to establish their right to the lime-rock which the defendants are excavating, this bill, which prays that the defendants be enjoined from further excavating, must be dismissed with costs.

6 374
15 87
8 374
22 140

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

FOR THE

COUNTIES OF WASHINGTON, NEWPORT, BRISTOL AND
KENT,

DURING THE SPRING CIRCUIT, 1860.

PRESENT :

HON. SAMUEL AMES, CHIEF JUSTICE.
HON. GEORGE A. BRAYTON, } JUSTICES.
HON. ALFRED BOSWORTH, }

**TOWN OF HOPKINTON v. THOMAS A. WAITE, Town
Treasurer.**

The warrant of commitment of a justice of the peace, committing a person furiously insane, who is at large, to the Butler Hospital for the Insane, is not void because neither it, nor the judgment of the justice of the peace issuing it, states the town in which the lunatic was arrested, nor because they do not state, that no recognizance was offered on the part of the lunatic that he shall not go at large until sound of mind; the former statement being merely of what the statute directs for the guidance of the hospital in collecting payment for the lunatic's support, and the latter, a statement only of what is presumed, until the contrary appears, from the fact of commitment.

Such omissions cannot, therefore, where the insane person is a pauper, avail the town in which he is settled in defence to a suit to recover the amount paid for his support at the hospital, by the town in which he was arrested.

Prior to July 1, 1857, when the Revised Statutes went into operation, no such payments at the hospital, made by the town in which the lunatic pauper was arrested could be

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recovered of the town in which he was settled; and if made, were voluntary and irrecoverable.

The judge trying a cause, with a jury, has a discretion with regard to the order of proof; and it is no improper exercise of this discretion for him to allow a party, who has closed his evidence upon the mistaken supposition that a material fact is admitted, to submit evidence of the fact to the jury, after the objection is made by the other party that the material fact has not been proved.

THIS was an action of assumpsit, brought by the town of Hopkinton against the defendant, as town treasurer of the town of West Greenwich, to recover a sum of money paid by Hopkinton for the support, in the Butler Hospital for the Insane, of Andrew Jackson Briggs, *alias* Nichols, a lunatic, upon the ground that the said Andrew was a pauper, settled in and chargeable to the town of West Greenwich.

The case was tried at the August term of this court for the county of Washington, 1859, before the chief justice, with a jury, under the general issue, when the plaintiffs, to support the issue on their part, submitted to the jury testimony tending to prove that the pauper was the son of Rowena Briggs, a single woman; that the said Rowena was the legitimate daughter of Anderson Briggs, who lived in West Greenwich from 1810 or 1812 to the time of his death, some twelve to twenty years ago, and that the mother of said Anderson was one Elizabeth or Betsey Briggs, who, besides Anderson, had two other sons, Henry and Jonathan. For the same purpose, and to show that the town of West Greenwich recognized said Anderson Briggs and Betsey Briggs as settled in said town and took control of them as chargeable to it, the plaintiffs offered sundry extracts from the files and records of the town of West Greenwich, some of which referred to a period as far back as the year 1791, among which was a certificate, that Elizabeth Briggs was let out with the poor of West Greenwich from the year 1791 to the year 1795; also a complaint, to the town council of West Greenwich, that Anderson Briggs was likely to become chargeable to that town, and the appointment of Jonathan Nichols as his guardian, and afterwards, upon the resignation of Nichols, the appointment of Royal Matteson as guardian of said Anderson; offering the records of said town of West Greenwich of the dates of July 28, 1828, March 25, 1833,

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and of the 28th of June, 1834, for this purpose. To this evidence the defendant objected, but the court, notwithstanding the objection, permitted the same to pass to the jury.

In further maintenance of the issue on their part, the plaintiffs further offered the proceedings before Matthew C. Card, Esquire, a justice of the peace for the town of Richmond and county of Washington, resulting in the commitment by him of the pauper, as a furiously mad person, dangerous to be at large, to the Butler Hospital for the Insane, to which the defendant objected, but which, notwithstanding the objection, the court permitted *pro forma*, to pass to the jury as admissible evidence. These proceedings were, a complaint and warrant and recognition for costs, in the usual form, both dated December 9, 1856; the former, signed by Pardon C. Burdick and addressed to Matthew C. Card, Esq. one of the justices, &c., and setting forth, under the oath of the complainant, "that Andrew J. Nichols, *alias* Andrew J. Briggs, now of said Hopkinton, laborer, is a lunatic, and so furiously mad as to render it dangerous to the safety of the good people of said county for him to go at large, is at large, against," &c. and praying advice, and that process might issue, and that "the said Andrew J. Nichols, *alias* Andrew J. Briggs, may be apprehended, and secured as by law in such cases is provided," &c. The warrant, under the seal of the justice, addressed in the usual form, commanded the officer to apprehend Nichols, *alias* Briggs, and to have him before Card, the justice, "or some other lawful authority, to be dealt with relating to the premises as to law and justice shall appertain."

It appeared by the officer's return upon the warrant, dated Richmond, December 10, 1856, that the lunatic was arrested on that day, and brought before the said Card, the justice.

The record made by Card of his proceedings as justice, upon the return of the warrant, was as follows: —

"Be it remembered, that at a justice's court, holden at Richmond, on the 10th day of December, A. D., 1856, on complaint of Pardon C. Burdick of Hopkinton, against Andrew J. Nichols, *alias* Briggs, charging him the said Nichols, *alias* Briggs, now

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in Hopkinton, with being a lunatic, or insane, and a dangerous person to be at large, and is at large, and so furiously mad as to render it dangerous to the peace and safety of our county and good people of this state, and even the lives of his friends, for him to be at large, and he is at large;

" Present.

M. C. CARD, Justice Peace;"

" Parties called, and both appeared in open court, and after an examination of witnesses and the said Nichols, *alias* Briggs, it is the opinion of the said court, that the said Nichols, *alias* Briggs, is an insane person, and that it is dangerous to the quiet and safety of the county and to the lives of his friends for him to be at large. It is therefore the judgment of said court, that said Nichols, *alias* Briggs, be removed to the Butler Hospital for the Insane, until he be restored to soundness of mind, or otherwise released according to law.

" M. C. CARD, Justice of the Peace."

The mittimus issued by the justice was as follows:—

" *The State of Rhode Island and Providence Plantations.*

" [L. s.] *Washington, Sc.* To the sheriff, his deputy, or to either of the town sergeants or constables in the county of Washington, and to the superintendent or keeper of the Butler Hospital for the Insane: Greeting:

" Whereas it appears to me the subscriber, one of the justices assigned to keep the peace in said county of Washington, on the complaint of Pardon C. Burdick of Hopkinton, that Andrew J. Nichols, *alias* Andrew J. Briggs of Hopkinton, is a lunatic, or insane, or so furiously mad as to render it dangerous to the safety of the good people of said county for him to go at large; and whereas said Nichols, *alias* Briggs, has this day been duly apprehended by complaint and warrant, and after a careful examination of said Nichols, *alias* Briggs, and evidence adduced, it is the judgment of said court that said Nichols, *alias* Briggs, be removed to the Butler Asylum for the Insane. You are, therefore, hereby required, in the name of said state, to take Andrew J. Nichols, *alias* Briggs, into your custody, and him con-

Town of Hopkinton v. Waite, Town Treasurer.

vey to the Butler Hospital for the Insane, and him deliver to the superintendent or keeper of said hospital; and you the said superintendent or keeper are alike required to receive the said Nichols, *alias* Briggs, into said hospital, and him safely keep until he be restored to soundness of mind, or be otherwise delivered therefrom by due course of law.

"Given under my hand and seal, at Richmond, this 10th day of December, A. D., 1856.

* MATTHEW C. CARD, Justice of the Peace."

It appeared by the officer's return upon the back of this mittimus, that on the 11th day of December, 1856, he took Nichols *alias* Briggs into his custody, conveyed him to the Butler Hospital for the Insane, and there delivered him to the superintendent or keeper thereof, as commanded.

After the plaintiffs had submitted their case to the jury in the opening, and the defendant had taken the point that the plaintiffs had given no proof that Andrew J. Briggs had no estate at the time of his apprehension and commitment, the court permitted the plaintiffs to offer proof to the jury upon that matter, notwithstanding the objection of the defendant; the counsel for the plaintiffs stating; that he should have offered such proof in its proper order, had he not supposed that the want of estate on the part of said Andrew was admitted by the defendant.

The jury having returned a verdict for the plaintiffs for the sum of \$152.89, the defendant now moved for a new trial, upon the ground of error in law in the above rulings of the court.

Wm. H. Potter, for the motion.

1. The complaint, warrant, judgment, and mittimus are defective, illegal, and void. The jurisdiction of the justice being special and limited, the proceedings should, upon their face, show that he had jurisdiction. *Fitch v. Commissioners of Highways*, 22 Wend. 122; *Chandler v. Nash*, 5 Mich. 409; *Den v. Turner*, 9 Wheat. 541; *Powers v. People*, 4 Johns. 292; *People v. Miller*, 14 Johns. 370; *Latham v. Edgerton*, 9 Cow. 227; *Kempe's Lessee v. Kennedy*, 5 Cranch, 174; *Owen v. Jordan*, 27

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Ala. 608; 1 Dutcher, 554; *Bradstreet v. Neptune Ins. Co.* 3 Sumn. 608; *Mathewson v. Sprague*, 1 Curtis, 457. The judgment of the magistrate is unconditional, that the lunatic be committed to the Butler Hospital for the Insane, without giving his friends, instead thereof, a right to give recognizance for him, as provided in the sixth section of the act relating to this subject. Dig. of 1844, p. 104. Again, the warrant does not state in what town the lunatic was arrested, and that he was arrested in Hopkinton.

2. To maintain this suit a compliance with the requisites of the statute is necessary. *Walpole v. Hopkinton*, 4 Pick. 358; *East Sudbury v. Sudbury*, 12 Ib. 1; *City of Boston v. Inhabitants of Amesbury*, 4 Metc. 278.

3. The court, after the plaintiffs had closed their case, and after the defendant had commenced arguing his case, permitted the plaintiffs to put in further evidence.

Dixon against the motion.

1. The complaint and warrant precisely conform to the sixth section of the act of 1844. Dig. of 1844, p. 104. The judgment also conforms to the act. The justice is to find the facts, and he is to *commit* unless a recognizance be given; and not, as supposed, *adjudge that he will commit*, unless a recognizance be given.

2. The proceedings show that the lunatic was arrested in Hopkinton; and the commitment states that he is of Hopkinton. Besides, the whole purpose of the requirement, to state the place of arrest in the mittimus, is, to show the hospital from what town they are to collect their account for his support.

BRAYTON, J. The first ground for a new trial set out in the petition of the defendant was waived at the hearing, and not insisted upon in the argument. In the argument, it was insisted, that the warrant of commitment was void, because neither the judgment of the justice before whom the lunatic was brought, nor his warrant of commitment, stated in what town he was arrested. By the original act authorizing the confinement in jail of a lunatic, so furiously mad as to be dangerous, it was provided, that the expenses of his support

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in jail and of his commitment should be paid out of his estate, if he had any; and if not, by the town which might be chargeable with his support. This act was amended in October, 1847, so as to provide, that instead of being committed to the county jail, he should be committed to the Butler Hospital, or other hospital for the insane. In 1848, the act was further amended. By this amendment, it was provided, that if the support of the lunatic should *not* be chargeable upon any town *in this state*, then the town in which he should be *arrested* should be liable for the expenses of his commitment and support at the hospital. For the convenience of the directors of the hospital, and that they might be informed of the town in which the arrest was made, and so to what town they were to look for payment, it provided further, that the justice who should order the commitment should also state in his warrant, in what town the lunatic was arrested. The last provision was not made, however, for the purpose of rendering that town chargeable with the expenses, but for the information of the directors of the hospital. The omission of such notice in the warrant would not, and was not intended to relieve the town where the arrest was in fact made from the expenses, upon other proof of the arrest there. This provision is merely directory to the justice; and no one can complain of the omission except the directors of the hospital, for whose benefit only it was made.

Another ground insisted upon was, that the justice who tried this cause permitted the plaintiff, after having rested his cause in the opening, and after the defendant had taken the point that no evidence had been offered that the lunatic had no estate wherewith to pay the expenses, to put in proof upon that point. From the statement allowed by the justice it appears, that the omission to offer such proof in the opening was purely by mistake, under the misapprehension that the defendant had admitted the want of such estate. It was a matter in the discretion of the judge, and it was no improper exercise of that discretion, to permit evidence to be offered which was necessary to the plaintiff's case, and which he had prepared, but which he failed to offer in the proper stage of cause, only because he un-

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derstood that the fact proposed to be proved was admitted by the other party.

Another ground assigned is, that the whole proceeding by the justice, the complaint, judgment, and mittimus are void; and so the commitment to the hospital was illegal and void, and insufficient to charge any town with the support of the lunatic. The complaint certainly sets forth all the facts necessary to give the justice jurisdiction to hear and determine the question, whether the person charged with being dangerous was a lunatic at large, and dangerous to the community. It charges that Andrew J. Briggs was a lunatic, and so furiously mad as to render it dangerous to the people that he should be at large, and that he was at large. This complaint made it the duty of the justice to issue his warrant to apprehend the accused, and upon examination into the truth of the matter charged in the complaint, to adjudge thereon, whether the complaint was true. He was also required, if the complaint proved to be true, to commit the person accused to the Butler Hospital for the Insane, unless a recognizance satisfactory to him should be offered, that the person charged should not be permitted to go at large until restored to soundness of mind. The warrant of commitment does not state that no such recognizance was offered to the justice before commitment. It states the judgment of the justice that the complaint was true, — that the person charged was a lunatic and dangerous to be at large, and that he had further adjudged that the lunatic be removed to the Butler Hospital; and he issues his mandate accordingly to the officer to commit, and to the hospital to receive and keep the lunatic. It is now insisted that the omission to state that no such recognizance was offered, renders this warrant void, — that such statement was necessary to show the jurisdiction of the justice, — that he had no power to commit, if such recognizance were offered. It is not pretended that any such recognizance was in fact offered; no such proof was offered. The justice had, therefore, in fact the power to commit, as he had committed the party to the hospital. The recognizance, or the offer of it, is not made necessary to the power of the justice to act. It is not necessary to give jurisdiction, or to confer upon him any power;

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all the power necessary to the commitment is conferred and vested in the justice already, and will continue unless the recognizance be offered. If offered, the power to commit is to cease, and not otherwise. Undoubtedly, every fact necessary to confer the jurisdiction or power upon the justice, acting within a special and limited jurisdiction, should appear upon the face of his proceedings. But does the same necessity exist to negative every fact which may take it away? We think not. It is to be presumed, at least, until the contrary appears, that the facts are as stated in the mittimus; and that they are all stated. If so, no recognizance was offered, and the power of the justice appears upon the process.

We do not see, however, when all these points are ruled against the defendant, how the plaintiff, under the law, can maintain this action. At the time the complaint was made against the lunatic in this case, and at the time of the trial, judgment, and commitment to the Butler Hospital, there was no law making any town liable for the expenses of the commitment and support of the lunatic, except that in which he had his last legal settlement, if he had any such legal settlement in any town in this state. It was only in case the lunatic had no legal settlement within the state, that the town in which he might be arrested was charged with these expenses. It was not until the Revised Statutes went into effect in July, 1857, that these provisions were changed. By the Revised Statutes it was provided, that where the lunatic was settled in this state, and should be arrested in a town other than that in which he had his settlement, the town in which he might be arrested should be liable in the first instance; and upon payment of the expenses might have its remedy over against the town where the lunatic was settled. Prior to the Revised Statutes, the lunatic had been committed, and thereby the town of West Greenwich, where this lunatic was settled, alone became chargeable with the expenses. The town of Hopkinton, though the arrest was made there, was under no legal obligation to pay, and could not be compelled to do so. The payments made by that town have been voluntary on its part. It does not appear that any request was made to that

Carpenter v. Brown.

town by the defendants to pay on their account, and certainly not, that the plaintiffs have paid by compulsion. The payments made, therefore, were in their own wrong, and for the recovery thereof they are without remedy.

LUCY ANN CARPENTER v. ELIAS F. BROWN.

Where a testator, by his will, gave to his wife "all his property, both real and personal, of which he was possessed at his decease, after paying all his just debts," and then gave her power to sell any part of his property for the payment of his debts and the support and education of his daughter until she arrived at the age of eighteen years, when the daughter was to have one half of his property, but in the event of her death before eighteen the wife was to have the whole; *held*, that the wife had an indefeasible title in fee to an undivided half of the real property of the testator, and by virtue of this interest, and her power under the will to sell the other half, could give a good title in fee to any specific portion of the testator's real estate.

BILL in equity to enforce the specific performances of a contract for the purchase of the westerly half of the "Noyes Neck Farm," so called, in Westerly.

The case was submitted to the court, upon the following agreed facts: Francis Carpenter, the husband of the complainant, died seised of the whole of said farm, containing about two hundred and forty acres; and by his last will and testament, which has been duly proved, appointed the complainant his sole executrix, and disposed of his property as follows:—

"I give and bequeath to my dearly beloved wife, Lucy Ann Carpenter, all my property, both real and personal, which I am possessed of at my decease, after paying all my just debts; and it is furthermore my will, that my dear wife should sell any part of my property that she may think right and proper to do, to pay my just debts, and to bring up, clothe, educate, and take care of my daughter, Susan Knowles Carpenter, out of my estate, until she arrives at the age of eighteen years; and then, it is my will, that my said daughter should have one half of my property; and it is furthermore my will, that if my said daugh-

Carpenter v. Brown.

ter should die before she arrives at the age of eighteen years, then it is my will that my said wife should have all my property."

The testator died seised of the farm in question, which had been purchased by him subject to the condition to pay to Asa Potter, trustee, the sum of one hundred and twenty dollars during the life of Caroline Thurston, and on her decease, to pay to the children of said Caroline, the sum of two thousand dollars. Subsequent to his death, his widow, the complainant, having exhausted all his personal property and the proceeds of a tract of land in South Kingstown, heretofore sold by her, in the payment of his debts and the support of the daughter, and expended therefor a large sum of money besides, in November, 1859, entered into the following written contract with the defendant for the sale and purchase of the westerly half of said farm:—

"I, Lucy Ann Carpenter, of Westerly, county of Washington, hereby agree to deed by warranty, in fee-simple, to Elias F. Brown, of said Westerly, the west part of the Noyes Neck Farm, so called, situated in said Westerly, as surveyed and platted by William C. Stanton of Voluntown, Connecticut, and containing one hundred and twenty and one quarter acres, and twenty-eight rods, subject to the following incumbrance and lien on said land, to wit: the said Brown to pay Asa Potter, trustee to Caroline Thurston, sixty dollars a year, during the life of said Caroline, and after her decease to pay one thousand dollars to the children of said Caroline, and to pay four thousand on delivery of said deed; and I, the said Elias, agree to take said deed of said land whenever the said Lucy shall notify me that she is ready to deed as aforesaid; and to pay to said Lucy the abovenamed four thousand dollars, according to the terms of this agreement.

"Westerly, Nov. 1859.

(Signed)

"LUCY ANN CARPENTER.
ELIAS F. BROWN."

Both parties were desirous to complete the contract; but doubts having arisen as to the title of the complainant, under

Carpenter v. Brown.

the will of her husband, to convey the interest stipulated for, this bill was filed for the purpose of resolving the same.

W. Updike, for the complainant.

1. The governing rule in the construction of wills is the intention of the testator; and where technical words of limitation are not used, this controls the quality of the estate derived. *Hogan v. Jackson*, Cowp. 299. "All I am worth;" "all my property," &c., have, under this rule, been held to mean "all my estate," and to convey, unless otherwise limited or controlled, a fee-simple. *Morrison & others v. Semple & another*, 6 Binn. 94; *Rossetter v. Simmons*, 6 S. & R. 452. Doe. dem. *Wall v. Longlands*, 14 East, 370; *Harrold v. Hoskins*, 2 Dev. & Bat. 479.

2. A devise to one with a power of sale gives a fee-simple in the estate devised; *Jackson v. Robins*, 16 Johns. 588; unless a more limited interest be expressed. *Morris v. Phalen*, 1 Watts, 389.

3. When the devisee is charged with some duty connected with the devise, the performance of which is inconsistent with any less estate, an estate of inheritance will pass. *Hall v. Goodwin*, 2 N. & M. 383.

E. R. Potter, for the defendant.

AMES, C. J. The first clause of the will of Francis Carpenter, if it stood alone, would vest in the complainant the whole of his estate, both real and personal, in absolute property; but the power to sell, which follows, and which is inconsistent with such a disposition, and the provision that his daughter, if she attained the age of eighteen years, should have one half of his property, qualify the first clause, and leave for the complainant only an undivided half of the testator's estate, with a contingent right to the other half, if the daughter should die before arriving at the age of eighteen years. The words "all my property, both real and personal," especially accompanied as they are with the charge of debts and power of sale, are quite sufficient to carry to the complainant a fee in the real property of the testator; indicating, as they do, in the connection in which they stand, all his interest in what he should be possessed of at the time of his decease; Doe & *Shell v. Patterson*, 16 East, 221; *Nicholls v. Butcher*, 18 Ves. 194; *Patton v. Randall*,

 Allen v. Brown & another.

1 Jac. & Walk. 189; and the words that follow only control their operation so far as to let the daughter into an undivided half of the estate, in the event she should attain the age of eighteen years. There can be no doubt that the testator intended that his daughter, if she survived the age of eighteen years, should have one half of his estate in absolute property; and precisely the same language is used to indicate the extent of the wife's interest in the other half, and, contingently, in the whole of his estate.

The complainant's right, under the will of her husband, to an undivided half of his real property in fee, would not, however, entitle her, before partition, to convey the western portion of the farm in question to the defendant. But we are of opinion that the express power given to her "to sell any part of the property that she may think right and proper to do," not only for the payment of debts, but to support and educate her daughter, confers upon her, under the facts agreed, this right; and, coupled with her fee in the other half, enables her, subject to the condition in favor of the Thurstons which the contract contemplates, to give to the defendant the title in fee-simple for which he contracted.

A decree must therefore be entered compelling the defendant specifically to perform his contract of purchase with the complainant, and the case, unless the parties otherwise agree, be referred to a master to settle the conveyance and superintend the due execution of the contract on both sides.

WATERMAN ALLEN v. EDMUND A. BROWN & another.

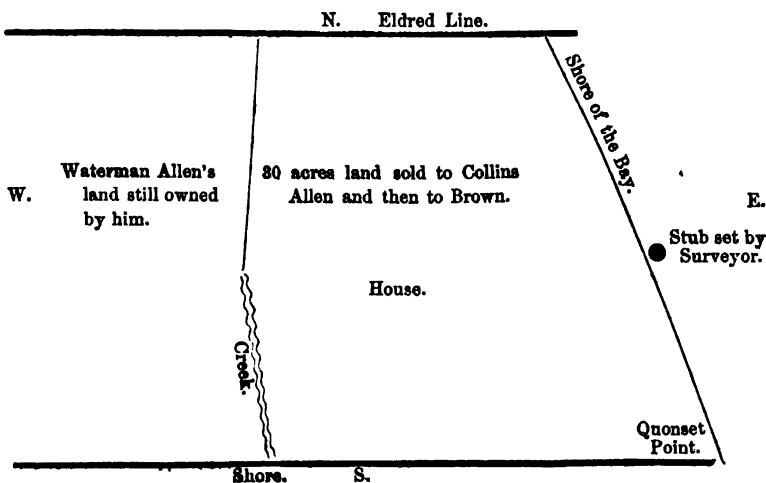
A court of equity, will, upon full and satisfactory proof, reform a grant of a sea-weed privilege in a deed of a farm, granting, through the ignorance of the scrivener of the principles of conveyancing, a greater privilege than the parties to the original contract designed, against a purchaser of the privilege and farm from one of them, who bought under a like contract; but where the purchase was induced by the fraudulent misrepresentations of the complainant as to the productiveness and value of the sea-weed

Allen v. Brown & another.

privilege really bargained for, and especially if it appear that the mistake in the grant merely makes the privilege granted equal in productiveness and value to the privilege contracted for as it was represented, the court will not interfere with such a providential adjustment of equities, but will dismiss the complainant's bill, with costs.

BILL IN EQUITY to reform, on account of a mistake in the draughting, two deeds of a tract of land, containing about thirty acres, situated at Quidnesit, in North Kingston, on the shore of Narraganset Bay; the one of said deeds having been executed by the complainant to his son, Collins Allen, and the other by said Collins to Edmund A. Brown, both of whom were made defendants to the bill.

On the 15th day of June, 1854, the complainant being the owner of a farm of about one hundred and fifty acres of land, lying at said Quidnesit, in consideration, as stated in the deed, of \$400, conveyed with warranty to his son Collins, thirty acres at the east end of said farm, bounded northerly by the land of the widow and heirs of Thomas Eldred, southerly and easterly on the Narraganset Bay, and westerly by a creek and ditch, and a line running thence northerly to a stake and stones on the Eldred line, which bounds and line separated it from the remaining land of the grantor. The following is a rough sketch of the premises conveyed:—



Immediately succeeding the description of the land granted, the deed contained this clause: "*And I, Waterman Allen, the grantor, convey to the grantee, Collins Allen, one third part or distance of my shore privilege, beginning at the north-east corner, it being the east end of the Eldred line, and running southerly on the east beach; each party has a right to pass and repass to each other's land, to and from theirs.*"

On the 29th day of December, 1855, Collins Allen, for the nominal consideration of \$2000, but really in exchange for the Shaw farm in Exeter of about one hundred and seventy-five acres, belonging to Brown, the defendant, and by him conveyed at the same time to said Collins, conveyed the above tract of thirty acres to Brown, by the same description of the land, seaweed privilege, and right to pass and repass, as contained in his deed from his father, to which he refers, and with this additional clause: —

"And Waterman Allen is to have the privilege of tipping up sea-weed on the beach on the Point."

The bill, which was filed on the 19th day of November, 1857, charged, in substance, that the real contract of the complainant with his son, Collins, and, subsequently, of the latter with Brown, and which the two deeds were intended by the parties to carry out, was, that the complainant should reserve two thirds of the sea-weed privilege, in distance, on the shore of the tract of land conveyed, and should convey only one third of that privilege, in distance, on that shore; — beginning to measure off the distance for which the privilege was conveyed, at the north-east corner of the tract conveyed, being the east end of the Eldred line, — and going southerly and terminating, as it should measure, on the east beach of the tract; that such were the instructions given to one Harris Smith, the draughtsman employed to draw the first-named deed, who, as well as the parties, supposed that he had accomplished this purpose of the parties by the above description of what was granted; that the complainant is unable to read, but was informed and believed that such was the import of the deed, and that his son Collins received his conveyance, and Brown his, and occupied under them, according to this construction; that in June, 1856, the complain-

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ant and Brown employed a surveyor to measure off and bound Brown's sea-weed privilege on the east shore of the tract granted, which he did to the satisfaction of both parties; that they both occupied up to this bound until some time in the fall of 1856, Brown purchasing from the complainant sea-weed taken from that part of the shore bounded out to the complainant, but now claimed by Brown, when some one apprised Brown of his right to claim the sea-weed privilege of the whole shore of the tract granted, under his deed, when he commenced an action of trespass against the complainant for carting sea-weed from that portion of the shore of said tract, which was designed to be reserved to the complainant.

The bill prayed for a reformation of the above deeds according to the contracts of the parties, for an injunction against the suit at law, and for general relief.

Pending the bill, on the 13th day of October, 1858, Brown conveyed the tract for the nominal consideration of \$1600, to one Alfred Dawley, not made a party to the bill.

The answer of the defendant Collins Allen, admitted, in general, the facts stated in the bill.

The original answer of the defendant Edmund A. Brown, denies all knowledge of the contract between Waterman and Collins Allen at the time of the conveyance by the former to the latter—but admits the exchange of farms between the said Collins and himself—averring that the farm given by him in exchange contained from 161 to 175 acres of land, some of which was very good, with a dwelling-house, and a new barn costing about \$300, and other improvements thereon—all of the value of between \$2000 and \$2500; that thirty acres of said farm, with the buildings, are worth as much as the land and buildings and sea-weed right admitted by the complainant to have been conveyed in exchange for the whole farm of the defendant—the land and buildings and right aforesaid not being worth more than from six to eight hundred dollars,—and that said Waterman and Collins Allen have often boasted since the trade that they had cheated the defendant out of from \$1000 to \$1500. The answer further alleges, that the natural capacity of the defendant is weak, and that in his best estate he is

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illy fit to cope with ordinary business men, and especially with one, who, although unable to read, is as sharp and shrewd in matters of trade as the complainant; that at the time of the said exchange of farms, the defendant was in an unusual state of excitement, debility, and weakness, which entirely unfitted him for attention to such matters, and that said Waterman and Collins took advantage of his said incapacity and excitement to overreach him in said exchange; that said Waterman and Collins had the deed of said Collins to him in their possession two or three days, after it was written and before it was executed, for the purpose of examining and understanding the same; that when said deed was originally drawn, the clause as to Waterman Allen was not in it, but was put there after it was executed; the defendant at the time objecting, and reluctantly letting it pass upon the assurance of the complainant and said Collins that there was sea-weed enough, annually, on said farm for its use, and enough more to sell fifty to seventy-five dollars worth; that the defendant never was on the farm conveyed to him by said Collins until some time in the evening of the day preceding that in the forepart of which the trade was made, and that both the complainant and said Collins then frequently told the defendant that there was then on the land about two hundred and fifty loads of sea-weed, and as often assured him that there was annually thrown upon the shore—said by them now to belong to the defendant—enough sea-weed to manure said farm fully, and also enough more for sale to bring him in from fifty to seventy-five dollars per year, and that said farm contained forty acres of land; that the soil of said farm is poor and sandy, and without sufficient sea-weed is worth but a trifle; that the defendant took said land and made said bargain, upon the full reliance that said representations were true; that afterwards, but not till long afterwards, he learned from observation and from those who knew the shore and the sea-weed thrown up there, that so far from these representations being true, he was constrained to believe that the complainant and said Collins knew them to be untrue at the time that they made them; and that, according to his best knowledge and information and belief, there has not been annually, and is not thrown upon said shore more

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than fifteen cart-loads of sea-weed and eel-grass, and that said farm does not contain more than about twenty-five acres ; that Harris Smith came to his farm one day and told him that he had come to survey the shore at the request of the complainant, and he reluctantly attended to the same, whereupon said Smith did survey the whole shore, and then measured off one third of it, and made a mark on a post on the same ; that said Smith at the same time surveyed the westerly line of the farm, but whether to the correct boundaries the defendant cannot tell ; though the plaintiffs afterwards admitted that they had run the line upon the defendant, and yet afterwards moved the fence farther east so as to include more of his land ; but the defendant admits that he did pay said Smith one half of his account for surveying, though he did not intend thereby to admit the correctness of his surveys ; that he did not say to said Smith what he had bought, nor that he had got more than he thought that he should get ; that often since the survey the defendant did go southerly of said post and take sea-weed, and that he often told persons that said survey was not right, and that he thought that he ought to have and could hold the entire beach ; that wanting at one time a little sea-weed with which to finish his planting, he bought of the complainant one dollar's worth, believing that in justice and equity it belonged to him ; that the defendant had ascertained that the complainant and said Collins had greatly cheated him, and feared that he and they would get into a dispute and perhaps into the law, and he desired to sell out and get clear of them, and with this view he advertised said farm and all said shore for sale, but did not sell the same ; that the defendant believes that the said Collins Allen, under his deed from his father, used to take, sell, and carry away sea-weed from the southerly shore of said farm ; *that it was talked that the defendant was to have the northerly third of said shore*, but it was also talked by the complainant and said Collins that the defendant would have sea-weed enough for all the uses of said farm, and enough more to sell annually, to bring him the annual sum of from fifty to one hundred dollars, and that the defendant relied on their said statements, and believed that he was to have and receive that amount and quantity from said shore annually ; and

the defendant avers that his naturally weak mind was so impaired and excited at that time that he does not believe that he had clear understanding of all that he was doing, nor of the consequences and effects of the same; that he did point out to Samuel Spink, and state to Marchant Weeden, Charles T. Hunt, and perhaps to others, the bound set up by Harris Smith, and at the time told them that he was not satisfied with the same; repeating to them what the complainant and said Collins had told him, as to the quantity and value of sea-weed he should have, as before stated; and the defendant may have pointed out or referred to said bound, and have said that he did not own but one third of the shore, though he does not now recollect it; that no one told him about holding the whole of said shore, but that recollecting what had been told him about the quantity of sea-weed, for a long time he could not tell whether said representations were true or false; that he learned from others and from his own observation that they were false, and that he had been greatly cheated and his incapacity taken advantage of; and that in justice and equity he ought to have from said shore said representations made good, and that this he claimed from his own sense of what was just, and not upon the suggestion of any one else; that when his deed was examined he was informed that such was the fair construction of the deed; that he has no recollection of ever asking permission to take sea-weed from the southerly portion of the shore of said farm, or of referring others to the complainant who came to the defendant to buy sea-weed from the same, but avers that he has forbidden the complainant from taking sea-weed from the southerly and easterly parts of the shores of said farm, and has commenced an action against him for taking sea-weed therefrom, which has been sustained. That the complainant has no right to call on the defendant to deliver up for cancellation or reformation a deed to which he was not a party; and the defendant would be glad to have, and now offers to have, both the deeds from him to said Collins, and from said Collins to him cancelled, and each restored to their respective estates as before said exchange.

In his amended answer the defendant, Brown, wholly denies

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the contract as set up in the bill, and avers that it was, that he should have not only the sea-weed coming upon the shores of the farm in question, but also have for sea-weed one third of Waterman Allen's remaining shore, and of the creek, and that he drew the deed from Collins Allen to himself, supposing that it would convey such a shore privilege; that the defendant was dissatisfied with Harris Smith's survey, and expressed his dissatisfaction to the complainant and his son, who assured the defendant that he had the best sea-weed privilege on the whole shore, and that he would have hundreds of loads of sea-weed come up on the north shore which they had set off to him; that the survey of Smith was a trick got up by the complainant and his son to destroy the value of the estate conveyed to the defendant for a valuable consideration, after the conveyance; that by the deed of Collins Allen to the defendant, the defendant had the right to go from his shore, west of the creek, and on one third of Waterman Allen's shore, and pass upon said Waterman's beach, and upon the cart-path or drift-way, by said Waterman's barn to the country road; and that the right of tipping sea-weed upon the defendant's point, reserved to Waterman Allen in the defendant's deed from Collins Allen, was inserted in said deed merely because, from the greater boldness of the water there, the sea-weed obtained by said Waterman from his own shore could more easily be taken from that place for sale; that this was the purpose of the reservation as understood by the defendant, and, as he believes, both by Waterman and Collins; that Collins Allen under his deed from Waterman occupied the whole of the east and south shores of the farm up to the creek, and one third of said Waterman's shore west of it, and drew and sold sea-weed from it; that before the survey by Smith, the defendant at different times, without objection from said Waterman, took sea-weed from the whole shore of said farm; that at the time of the making of the deed to this defendant both the said Waterman and Collins represented that all the sea-weed in the farm-yard, of which there was a large quantity, was drawn from the shore of said Collins, and that, in addition, he had sold a large quantity to the people of Bristol and others who came and carried it

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away ; that said Collins stated that he had let the south shore from Quonset Point to the creek, to John Gladding and William H. Reynolds, for eight months, at fifty dollars ; and that the defendant believes said Waterman was present at this statement ; that both father and son represented to the defendant that he could plant the whole farm, and cover it all over with sea-weed, and might thus raise one thousand bushels of potatoes in a year, besides having sea-weed for sale. The amended answer also sets up the defendant's conveyance of the farm to Alfred Dawley, on or about the 13th day of October, 1858, and the negotiation preceding the execution of said deed, and the consideration paid by Dawley to the defendant for the same.

To these answers, the general replication having been filed, proof was taken on both sides ; that of the complainant, to prove the original contract between Collins Allen and himself, and between the former and the defendant Brown, consisting, principally, of the testimony of Harris Smith, who, as scrivener, drew the deed from the complainant to his son, and who testified that he was instructed to convey only the sea-weed privilege of the north third of the shores of the farm, the remaining two thirds thereof to be reserved to the grantor, and supposed that, by the language he employed, he had carried out his instructions. This witness also swore that in May, 1856, at the request of both Waterman Allen and Brown, he measured off the latter's sea-weed privilege on the east shore of the farm, and put up a bound at the southern terminus of said privilege under the directions, and to the satisfaction of both parties. The complainant also produced several witnesses to admissions of the defendant Brown, that the original contract was as set forth in the bill, and that Brown had, on different occasions, pointed out the bound set by Smith, as the limit of his sea-weed privilege ; and that, for the first season of his occupation of the farm, he had taken sea-weed only from the third part of the shore bounded out to him, which was to be taken in connection with the admission in his answer that he had on one occasion bought of the complainant sea-weed from other parts of the shores of the farm.

Besides replying to this evidence, by attempting to impeach

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the character of Harris Smith for truth and veracity, with regard to which several witnesses were sworn and deposed on both sides, and showing that Collins Allen, during his occupation of the farm, after the deed of his father, carted sea-weed from the south as well as from the east shore of the farm, and let the south shore from the 12th day of May to the 12th day of December, 1854, to Gladding and Reynolds, as averred in the answer, and that he himself had at sundry times made claims inconsistent with the notion that he understood his sea-weed privilege to be limited as set forth in the bill, the defendant to maintain the defence taken by him, that the exchange of farms was procured from him, whilst in a weak and excited state, by the fraudulent misrepresentations of the complainant and his son as to the productiveness and value of the sea-weed privilege of the farm taken by him, produced several witnesses. Five witnesses were produced and sworn on the part of the defendant: three of them his sisters, and one of them, Mr. John J. Reynolds, with whom the defendant had lived at different times during the last eight or ten years as an assistant in his shop in North Kingston, who testified to his nervous and excited condition at the time of the exchange, and, generally, to his unfitness on this account to conduct such business. Their testimony, in this respect, was confirmed by that of Nicholas Dawley, Brown's brother-in-law, a witness produced for another purpose by the complainant. Four witnesses swore to the representations of the complainant to the defendant Brown, as to the productiveness and value of the sea-weed privilege attached to the farm; one of whom was the complainant's witness, Dawley; and several witnesses also testified as to the falsity of those representations, and some to the complainant's statements indicative of his knowledge of their falsity at the time that he made them. The defendant also produced the depositions of several witnesses as to the relative value of the farm received by him in exchange, with that of the Shaw farm, given by him in exchange, with and without the sea-weed privilege of the whole shores, and upon this point also the complainant produced some testimony.

The productiveness, in sea-weed, of that portion of the east

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shore set off to the defendant, during the two years (1857 and 1858) when he occupied it, was sworn by the witness Covil, to be about twelve cart-loads; the principal portion of the seaweed coming up on the south shore of the farm, and admissions of the complainant were proved confirmatory of this. A grandson of the complainant testified that both shores of the farm produced from three hundred to one thousand cart-loads annually; and that he had seen one hundred to one hundred and fifty loads on the north shore at different times, in past years. Another witness of the complainant's swore, that seven or eight years before he saw one hundred loads upon the northerly portion of the east shore, after a storm, but that he had never known so much there before or since. The complainant's witnesses did not speak to the annual productiveness of the east shore; but the testimony produced by the defendant was, that it was small and quite insufficient to manure the defendant's farm; and Dawley, the brother-in-law of the defendant, — but produced as a witness by the complainant, and who lived upon the place a year with Brown, — swore, that the seaweed produced by both shores of the farm was about equal to what the complainant represented the third set off to Brown would produce.

The case was submitted to the court, in vacation, upon written arguments, which turned altogether upon the evidence.

E. R. Potter, for the complainant.

W. Updike, for the defendant Brown.

AMES, C. J. The power and duty of a court of equity to reform an instrument drawn by mistake, so as to make it express what both parties originally intended, is unquestionable, whether the instrument be designed as evidence of an executory or an executed contract, and whether the question arises between the parties to the instrument, or those claiming under them in privity, as heirs, devisees, judgment creditors, voluntary grantees, or purchasers with notice. 1 Story, Eq. Jurisp. § 165. In the exercise of this jurisdiction the court will require for its action clear, full, and satisfactory proof of the mistake; and will, both in the spirit of the common-law rule which prohibits the admission of inferior evidence to contradict

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that which is written, and of the statute of frauds, where it applies, proceed with great caution upon evidence resting in parol. Such a court would, however, in the language of a distinguished American jurist, "be of little value if it could suppress only positive frauds, and leave mutual mistakes, innocently made, to work intolerable mischiefs, contrary to the intention of the parties. It would be to allow an act, originating in innocence, to operate ultimately as a fraud, by enabling the party who receives the benefit of the mistake, to resist the claims of justice, under the shelter of a rule framed to promote it." 1 Story, Eq. Jurisp. § 155; see also §§ 156-159. Accordingly, in this country, as well as in England, although evidence inferior in its general nature is received for the purpose of correcting an undesigned variance between the real and the written contract, the courts refuse relief unless in cases clearly and unequivocally proved to require it; and hold, that it would be at least exceedingly difficult to prove the mistake, if the answer denied it, and there was nothing to rely upon but the recollection of witnesses. 2 Leading Cases in Equity; Hare & Wallace's notes, 680-684; Adams's Equity, 168, n. 1, 168-171, and cases cited.

The case stated for the complainant is, that in selling the north-east corner of his farm to his son, it was agreed between them that he should reserve two thirds of the sea-weed privilege of the tract, in distance upon the shore, and grant only one third of the privilege, measuring the third so granted from the east end of the Eldred line, southerly, upon the east beach, and that when his son afterwards parted with the farm by exchange to the defendant Brown, the latter agreed to take the farm upon this understanding of the extent of the sea-weed right held by his grantor, and to be conveyed to him; but that the scrivener employed to draw the deed from the complainant to his son, the description in which was copied into the deed from the son to Brown, instead of reserving to the complainant two thirds of the sea-weed privilege of the tract as agreed, granted, by the terms of the deed, the whole tract, carrying all rights and privileges with it, and then, nugatorily, attempted to limit the grant by a further grant of part only of that, the

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whole of which had before been granted. It is true that if such a mistake was made, it arose from ignorance of the principles of conveyancing on the part of the draughtsman of the first deed; but where an instrument is so drawn as to violate the intent of the parties to the agreement which it is designed to execute, through the draughtsman's ignorance of law, equity will correct the mistake, and thus produce a conformity of the instrument to the agreement, equally as if the draughtsman's mistake had arisen from his ignorance of facts. *Hunt v. Rousmaniere's Adm'r*, 1 Peters, Sup. Ct. R. 1, 13. A distinction is recognized between such a case, and a case in which the parties have deliberately agreed upon a certain kind of instrument which is, from its nature, best calculated in some respects to carry out their views, although in some contingencies which they did not contemplate, or, concerning the adaptation of the instrument to meet which, they were badly advised, it would not serve their purpose. In the one case, it is not the instrument upon which the parties have agreed; in the other, it is the precise instrument agreed to be given and received, although, had they contemplated or known its operation in every aspect, they would not probably have agreed upon it. *Ibid.*

The proof of the mistake alleged by the complainant is mainly derived from the internal evidence afforded by the deeds themselves; a source of evidence as high, because the same, as the instruments to be corrected, and, upon every principle, perfectly unexceptionable. 1 Story, Eq. Jurisp. § 168. No one can read the deeds, so far as they relate to the seaweed privilege, without perceiving, that from ignorance of the distinction between an exception or reservation out of a grant, and an inconsistent explanation of what was granted, the transparent intent of the parties to them was, in this respect, miserably defeated. We must reject altogether the clause of explanation, the only one which expressly speaks of the seaweed privilege, and taken by itself, clearly though inartificially tells what the parties intended with regard to it, before we can come to the conclusion that the complainant, in his deed to his son, designed to convey more than either one third of the whole shore privilege, in distance upon the shore of the farm out of

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which this tract was sold, or one third of the privilege in distance, upon the shore of the tract. This third, whichever it was, was to be measured off, beginning at the north-east corner of the tract, which would bring it upon the east beach, and was to extend southerly upon that beach; the inference from the description being, that it would be exhausted upon the east beach, and before it reached Quonset Point. When, in addition to this, we consider the evidence of the scrivener who drew the deed, that the contract of the parties was that the grant should embrace only the north third of the sea-weed privilege, in distance upon the shore of the tract conveyed, and that by the deed as drawn he designed to carry out this contract, and supposed that he had done so; that this was explained to the defendant Brown, at the time of his purchase, and that he purchased upon this construction of the grant, the precise words of which were incorporated into that received by him; that the privilege was thus measured off by the scrivener, who was also the surveyor employed for that purpose by the complainant and Brown, and a post was by him set up on the east beach, as the southern bound of the shore privilege of Brown; that this bound was during the first season of his occupation repeatedly pointed out by Brown as the limit of his sea-weed privilege upon the shores of the tract; that the occupation of the parties during this season conformed to the bound, and Brown actually bought of the complainant sea-weed from the shores of the tract beyond the bound; and, lastly, that all this is, in effect, admitted in Brown's answer, as originally drawn, and, with the exception of what the contract with him originally was, in his amended answer, we cannot doubt that the original contracts of the complainant with his son and of his son with Brown were as alleged in the bill, and that by mistake of the scrivener and of all parties, the deeds were not, in respect to the sea-weed privilege, drawn in conformity to the contracts. Indeed, as suggested by the counsel for the complainant, Brown's cross-examination of the witness Smith, contains, in the form of a question personally put by him to that witness, an implied admission that such was his understanding until he had an opportunity to examine and understand the effect of his deed,

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which, if he had understood before the survey sworn to by Smith, he never should have allowed the survey to be made.

Were this the whole case, our course of duty would be plain, to give to the plaintiff the relief which he asks. The aid of a court of equity in holding parties to their contracts, either by specifically enforcing them, or by correcting mistakes in the instruments executed as evidence of them, is always, however, limited by the countervailing equities, in the same matter, of those against whom it is invoked. These equities it compares and balances with those upon which it is required to act, and by virtue of them it modifies, or refuses altogether its relief, as will best conserve the cause of justice. Not only actual fraud, but surprise in the nature of it, a hard and unconscionable bargain, and even laches, may always be set up to bills of this nature, in total or partial defence, according to the circumstances. A strong example of this is found in the course of a court of equity with a bill to rescind a contract, on the ground of fraud; for, though the relief in such case is *strictissimi juris*, there may be circumstances which may justly mitigate the severity of the law; or may place the parties *in pari delicto*; or require the court, from the demerits of the plaintiff in the particular transaction, to abstain from the slightest interference. 2 Story, Eq. Jurisp. § 694.

Now the answer, in substance, sets up by way of defence to this bill, that the defendant, at the time he exchanged his farm in Exeter for this tract of land in North Kingston, was in a weak and excited condition of mind, which incapacitated him, not only from coping with the complainant, who principally managed the bargain on the part of his son, but from making with any one so important a contract; that having never seen the tract but once before the bargain was made, and then only the evening before, and being wholly unacquainted with its capabilities, the complainant and his son, amongst other things, represented to him, that the sea-weed privilege, which under the deed was to pass with the tract, would not only furnish sea-manure enough, annually, for the use of the place, but give him a surplus to sell, worth to him from fifty to seventy-five dollars per annum; that these representations were not only

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false,—the privilege concerning which they were made yielding only some fifteen cart-loads of sea-weed and eel-grass, a year,—but were known by both the complainant and his son to be so; and that in consequence of these misrepresentations he was, in his weak and excited condition, induced to exchange his Shaw farm, of one hundred and seventy-five acres, for a tract of thirty acres, which, without the privilege of sea-manure conveyed by the deed, is not worth more than a quarter of the value of the farm given in exchange.

Upon a careful consideration of the evidence submitted to us, on both sides, touching this matter in defence, we are constrained to say that it is substantially proved. The decided weight of the evidence is, that although the defendant Brown, has not, at any time, been an insane man, yet at the time of this exchange, and for some time previous and since, he was, and has been in a nervous and excitable condition, rendering him incapable of that caution and deliberation which a business transaction of such a nature requires. This is deposed to, not only by members of his family, and by his neighbors, but by a highly respectable witness, Mr. John J. Reynolds, with whom he has lived, at different times, for eight or ten years, as an assistant in his shop, in North Kingston. Even the complainant's witness, Harris Smith, undesignedly confirms this testimony by his narrative of the pleased condition of Brown when going to make the bargain of exchange, congratulating himself as he went up the road from the shop of Smith, with the saying of "a fool for luck;" and hallooing to the witness as he repassed the shop on his return from making the bargain, the same expression. This state of excitement alone, and if he had been fairly dealt with, certainly would not have been sufficient to impeach the contract made under it, or even to have furnished a reason why, there being a mistake in the deed, he should not be held to his bargain. But the evidence further shows, that strong representations of the productiveness and value of the sea-weed privilege to be granted, were made by the complainant to satisfy him and his family of the expediency of the exchange, and precisely as stated in the answer. Four witnesses, one of them produced by the complainant, swear to these rep-

representations ; and there is much other evidence in the case coming from both sides, that shows what prevailing effect, in his then excited condition, these representations had upon the defendant. If his friends objected that the tract, for which he purposed to exchange his farm had no firewood upon it, his answer was, that he should have surplus sea-weed enough to buy it with ; if, that it was illy fenced, the surplus sea-weed was the fund out of which this want was to be supplied. His heated expectations in this matter, in the absence of all personal knowledge, must have been built upon the representations of the complainant and his son ; and as these related to a fact, and not to opinions merely, if falsely, and especially if fraudulently made, they raise up a strong equity in defence to the bill. Now the evidence, upon examination shows, that the portion of the shore which by the alleged contract was to be measured off to the defendant for a sea-weed privilege, was the most unproductive part, for this purpose, of the shores of the tract ; that, although on one occasion, about eight or ten years ago, some hundred cart-loads of sea-weed were, after a violent storm, cast upon it, yet that its annual product in this way is, in general, small, and insufficient even to manure the tract, not yielding more than from twelve to fifteen loads a year ; and, indeed, that the whole shore of the granted tract,—for such is the testimony of Dawley, the complainant's witness,—will not yield more sea-weed, annually, than the complainant represented might be obtained from that portion of it which, by contract, was to be measured off to Brown. The evidence further shows, not only that these representations of the complainant were not known to him to be true, but that they were known by him to be false ; this being inferable not only from his knowledge, as former owner of the premises, of the relative value of the different parts of the shore for sea-weed, but from his own admissions and boasts of the great bargain he had got out of the defendant, made just after it was executed. The result is, that the complainant, as the weight of the proof indicates, has obtained for his son decidedly the advantage in the exchange of farms, even if we leave the parties precisely where we find them ; but if we correct the mistake which was made in drafting the

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deeds, his son will have an advantage in the bargain, according to the complainant's estimate, of from a thousand to fourteen hundred dollars.

It is no answer to this to say, that the defendant sought the exchange, — was rejoiced at it when made — and even boasted of his sea-weed privilege afterwards, until his experience of its unproductiveness had corrected the impressions made by the misrepresentations of the complainant. All this merely shows how entirely, in his eager and excited state, he trusted to the inflamed statements of his opponent in the bargain, of which he should have been wary, and how completely he has, in consequence, been overreached by him.

Under such circumstances, a mistake in the conveyance which executed the contract having providentially balanced the mischief wrought by the misrepresentation which procured it, the most perfect justice will be done by not interfering with this most equitable adjustment, and by dismissing the bill of the party who seeks to disturb it, with costs.

By the amended answer, it appears, that the defendant now claims under his deed not only the sea-weed landed on the shores of the tract conveyed to him, but a sea-weed privilege, also, in one third of the remaining shore of the complainant's farm. As this may lead to further litigation, we think it proper to add, that such a claim finds no support in the language of the deed under which it is made. This compels the defendant to begin to measure his third, in distance upon the shore, from the north-east corner of the tract conveyed, although it does not limit, as it was designed to do, the effect of the preceding conveyance to him, of the whole tract with its appurtenances.

Bill dismissed, with costs.

SIMEON C. TUCKER & another v. BENEDICT ELDRED & others.

In opening a new highway or amending an old one, the town-sergeant or surveyor may, under the law, remove growing trees or brushwood from the space appropriated to the highway, but has no right, as included within the original assessment of damages, or the easement of the public, to use such trees or brushwood in the building or amendment of the roadway; and if he does so use them, he becomes a trespasser.

TRESPASS for breaking and entering the close of the plaintiffs in South Kingston, and cutting down the trees, wood, timber, and brushwood of the plaintiffs, and burying the same under the ground.

The case, which had been appealed from the court of common pleas, was tried, under the general issue in this court, at the February term for the County of Washington, 1860, with a jury, when it appeared, that the town of South Kingston, having laid out a highway through the farm of the plaintiffs, and having paid the damages assessed against them therefor, under the statute, the defendants, who were the town-sergeant and his assistants, in opening and making the same through a space of some thirty-nine rods long by three rods wide of wood-land, cut down the trees of the plaintiffs growing thereon, and used, as materials in building the road in the swampy places, the wood and brush so cut on the land of the plaintiffs taken for the road.

The jury assessed the plaintiffs' damages at thirty dollars; the verdict being, by agreement, subject to the opinion of the court, upon the question of law: Whether trees and brushwood growing upon land condemned to the uses of a highway, are, under the statute, included in the condemnation and estimate of damages, or, when removed by the surveyor for the purpose of opening and building the new highway, are to be left for the use of the owner of the land?

E. R. Potter, for the plaintiffs.

W. Updike, for the defendants.

BRAYTON, J. The question submitted to the determination of the court in this case is, whether a surveyor of highways is justified in law, not merely in cutting and removing timber stand-

ing or growing within the line of the highway newly laid out, and which straitens, hinders, or incommodes the public in travelling, but in using the timber grown there in the construction of the way?

By the general rules of law, the public have but an easement upon the land lying within the lines of the highway. Notwithstanding the laying out of the highway and the condemnation of the land to the use of the public for travel, the title to the soil, and all the profits thereof consistent with the existence of the easement, remain in the original owner. He has a right to the freehold and to all the profits which may be derived from it, consistently with the right of passage of the public,—to all mines beneath the surface, to all trees, grass, and pasturage upon and above the surface. *Goodtitle v. Aiken*, 1 Burr. 133; *Stevens v. Whistler*, 11 East, 51; *Doe v. Wilkinson*, 3 B. & C. 413; *Perley v. Chandler*, 6 Mass. 454; *Jackson v. Hathaway*, 15 Johns. 447; *Gedney v. Earl*, 12 Wend. 98. Our statutes (ch. 43, § 8, ch. 44, § 17, of the Rev. Sts.) provide, that upon the laying out and establishment of a highway, everything upon the land which shall in any way straiten, hinder, or incommode the travel, may be removed therefrom; as buildings, fences, trees, or other thing whatsoever. This right the law would imply without the statute; since upon the passing of the easement to the public, everything reasonably necessary to its enjoyment passes with it.

This power is necessarily vested in the surveyor of highways, who is appointed by law to keep the way in repair for the convenience of the public. He, therefore, may remove the trees, if they in any way interfere with the travel; but the right to remove gives him no property in them.

There seems to be no difference in this respect, certainly no material difference, between a public and a private way. In the one case, the easement is for the benefit of the general public; in the other, for that of an individual; but in neither case does any property in the land, or its incidents, pass from the owner of the soil; and the individual, in the one case, and the public in the other, are to make and maintain the way in proper condition for travel, at his or their own expense. If the way may be made cheaper with timber than with earth, it must be pro-

vided by them; and if they will take that which is another's for this purpose, they do it at their peril.

It is said, indeed, that in the assessment of damages for the laying out, the use of the wood is made an item of these damages. The damages for which the statute provides, are, "the damages which the owners of the land shall sustain by means of such highway passing through their lands;" that is, the damages which they may suffer from the right of the public continually to pass over their lands,—the adaptation of the soil to that passage,—the removal of everything therefrom which may interfere with the travel, and the fact that they must, by such use, be deprived, to a great extent, of the profit of the soil; the growth of timber thereon being one source of profit. These damages are necessarily assessed before the land is entered upon for the purpose of making the way; and, therefore, cannot be for all the injury, necessary or unnecessary, which may be actually done by the surveyor or other person, in making the way, and opening it for travel. The assessment can only be for such damages as necessarily will be done to the owner of the land, in order that the public might be enabled conveniently to pass over the land. The use of the timber in the construction of the way is certainly not reasonably necessary to the passage of the public; though the removal of it from the path may be, and would be. Until such necessity is shown, no reason is shown why the value of the timber should be an item of damages to be awarded to the owner of the land.

The same reason is equally conclusive against the right of a surveyor of highways, in the course of repairing or amending the same, from doing more in relation to the timber growing within the lines of the highway, than to cut down and remove it, so that it shall not impede the travel. According to the agreement, therefore, judgment must be entered upon the verdict.

COUNTY OF NEWPORT, FEBRUARY TERM, 1860.

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GEORGE W. CHACE & others v. ABBY A. CHACE & others.

The statute claim of a child, born after the execution of his father's or mother's will, for whom no provision is made therein, to the same right and interest in the estate of his father or mother, as if the father or mother had died intestate, cannot be resisted by proof, that the omission to provide for him was intentional; and hence, on the trial of an action of ejectment, in which the plaintiffs claimed against the will of the parent in right of the after-born child, parol evidence to this effect was held inadmissible.

TRESPASS and ejectment, to recover six undivided eighth parts of a farm in Portsmouth, of which Samuel W. Chace, late of said Portsmouth, died seised.

The case was tried at the February term of this court for the county of Newport, 1859, before the chief justice, with a jury, when it appeared, that Samuel W. Chace, being seised of a farm in Portsmouth, which he had inherited from his father, Abner Chace, on the 8th day of September, 1856, duly executed his last will and testament, and thereby devised and bequeathed all his estate, real, personal, and mixed, to which he was entitled, or should be entitled at the time of his decease, to his wife, Abby A. Chace, one of the defendants; that the said Samuel, afterwards, on the 10th day of October, had born to him by the said Abby A. a daughter, who was named Clara Matilda Chace; and afterwards, on the 18th day of January, 1857, died, leaving his said minor daughter and his said wife to survive him; that the said will of the said Samuel was, on the 18th day of February, duly proved before the court of probate for the town of Portsmouth, and that the said Clara Matilda Chace afterwards, on the 10th day of April, 1857, died.

The plaintiffs represented six of the eight brothers and sisters of Samuel W. Chace, and claimed their portions of the farm in question as the heirs or next of kin of the said Clara Matilda

Chace, of the blood of her father, Samuel W. Chace. The defendant, Abby A. Chace claimed the farm under the will of her husband, the other defendant holding under her.

At the close of the case of the plaintiffs, the defendants offered to prove by parol testimony, that the said Samuel W. Chace, at the time of making his will, knew that his wife was big with child, and that it was his intention, notwithstanding, to give his estate entirely to her, leaving her to provide for the child; and that after the birth of the child he expressed the same intention in expectation of death. The presiding judge ruled out this testimony upon the objection of the plaintiffs; whereupon the jury having returned a verdict in favor of the plaintiffs, the defendants now moved for a new trial, upon the ground that said ruling was erroneous in matter of law.

Bradley and Sheffield, for the defendants.

1st. When the law implies the revocation of a will, from facts *dehors* the will, as from a subsequent marriage and birth of a child, such revocation may be avoided by parol evidence of a contrary intent in the mind of the testator. 1 Jarman on Wills, 150; 4 Kent's Com. 523; *Wheeler v. Wheeler*, 1 R. I. Rep. 364, 372.

2d. The act respecting wills should be taken as a whole, and its parts should be so construed as to give effect to its main purpose: the grant of testamentary power. Hence, of the two constructions of the clause in question, (Dig. 1844, p. 232, § 6; Rev. Stats. ch. 154, § 10,) that which considers it as a provision for cases of accident only, has prevailed with the courts; so that the will, when shown to be in accordance with the real intention of the testator, is allowed to stand; and this intention may be shown by evidence *aliunde* the will.

Upon a similar statute, the Massachusetts courts have held to the construction claimed by the defendants. *Ferry v. Foster*, 1 Mass. 146; SEWALL J. *Church v. Crocker*, 3 Mass. 17; PARSONS, C. J. *Wilder v. Goss*, 14 Mass. 357. The Revised Statutes, and the later cases in Massachusetts, confirm this view. *Wilson v. Fosket*, 6 Met. 400; *Bancroft v. Ives*, 3 Gray, 367. See, also, *Havens v. Vandenburg*, 1 Denio, 27.

3d. Suppose the will had expressly declared the testator's knowledge of *the coming event*, and his intention to make just such a will as he had in view of it, would this clause of the statute overrule its other provisions, and the intent of the testator thus made known? No court, we think, would so declare. If, then, some fact *dehors* the will is to overthrow the will, should not that fact come before the court with all its modifying facts? If from that fact alone one inference would be drawn, may not other facts be offered to show that this inference would be a false one? *Wheeler v. Wheeler*, *supra*, establishes the admissibility of the evidence of acts and circumstances to rebut a statutory revocation of a will in Rhode Island.

4th. The policy of our law has always been to uphold wills, and the testamentary power. It is right that the subordinate sections of our statute of wills should be so construed as to harmonize with, and not to defeat, the main purpose of the act; and no instance can be found in the history of jurisprudence in this state, in which a will has been set aside, except one, and then to uphold an earlier and better will.

Wm. H. Potter and *Van Zandt*, for the plaintiffs.

1st. The plaintiffs claim under a statute title; the statute declaring that a child born after the execution of his father's or mother's will, shall, notwithstanding the will, have the same right and interest in the estate as if the father or mother had died intestate. The offer of the defendants is, to prove by parol, that the testator desired his property to go according to *his will*, and not according to *law*. The statute of descents, in case of intestacy, no more passes an estate to the heirs of the person last seised or entitled, than this statute does to the child born after the execution of the will.

2d. It is not the *actual*, but the *legal*, intention of a testator, by which his will is to be construed; and any other disposition of his property according to his intent than that which the law allows, can no more be said to be accordant with its policy, than it would be to sanction a will because of the testator's intent, when not executed in presence of the statute number of attesting witnesses. *Martindale v. Warren*, 15 Penn. 471. Upon

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the question of title under a will, declarations of the testator *after the making of his will*, of his purposes and intents, are not admissible. *Weston & others v. Foster & others*, 7 Met. 299.

3d. Legislation in Rhode Island has always, and by all possible means, secured the transmission of real estate according to the blood. Dig. 1798, pp. 281, 287; Dig. 1822, p. 217. These statutes provide for a child born after the death of the father, and make no provision for a child born before, but after the execution of his will. Provision is also made in case of intestacy for posthumous children. Dig. 1798, p. 287. The statute under which this question arises, (Dig. 1844, p. 232,) first provided for children born after the execution of the parent's will who had no provision made for them in it, and was designed to enlarge the *rights* of the testator's children so born, and to make them peremptory against his will.

4th. The cases cited by the defendants from 6 Metcalf, and 3 Gray, have no application to our statute; the Massachusetts statute, giving the right to the after-born children to take, "*unless it shall appear that such omission was intentional and not by any mistake or accident;*" and the present statute is treated by them as a mere adoption by the legislature of the judicial construction of the act of 1783. The Massachusetts construction of their act was well known to our legislators; and the change made by our act of 1844, indicates that our legislature intended to have, in this respect, a law different from that of Massachusetts. The Massachusetts decisions are wanting, too, in uniformity, and are contradictory. Contrast *Wilder v. Goss*, 14 Mass. 357, with *Tucker v. Boston*, 18 Pick. 162.

5th. The New Hampshire act, now in force, differs much less from the Massachusetts act than our own. Yet the supreme court of that state held, that the Massachusetts decisions were not applicable to it, nor a decision of their own court, under a former act of New Hampshire. See *Gage v. Gage*, 9 Foster, 533.

6th. Our statute makes a clear and uniform rule, and gives voice and expression to a law of nature, that it is to be pre-

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sumed that a man intends that his children shall inherit his estate unless he positively disinherits them. All the analogies of the law support a rigid construction of this statute. Observe how far, in cases of wills and devises, the courts have gone to include after-born children. *Stedfast v. Nicoll*, 3 Johns. Cas. 18; *Swift v. Duffield*, 5 S. & R. 38; 2 Jarman on Wills, pp. 102, 103, and notes.

7th. The wisdom of our statute could not be more strongly exemplified than by this case, in which, unless the only daughter of the testator inherited under this statute, she would, if she had lived, been absolutely penniless; while, on the other hand, if the child took, the mother would, notwithstanding, be well provided for under the law.

BRAYTON, J. The statute under which the question now submitted to the court in this case is raised provides, that "when any child shall be born after the execution of his father's or mother's will without having any provision made for him in such will, he shall have a right and interest in the estate of his father or mother in like manner as if his father or mother had died intestate, and the same shall be assigned to him accordingly." Digest of 1844, p. 232, § 6.

The daughter, Clara Matilda Chace, was born to the testator after the execution of his will, and no provision is made for her in the will of her father; and the plaintiffs, who are heirs at law of the said Clara Matilda, claim, that by the express and plain provision of the act she became entitled on the death of her father to the same share in his estate, real and personal, as she would have inherited had he died intestate.

Upon the face of this provision of the statute, such must be the necessary result. Taking this section of the act by itself, there is but one construction to be given to it, viz.: that an after-born child, not provided for in the will, shall inherit in the same manner as if no will had been made;—that as against him the will shall be inoperative;—that such child shall not be thus disinherited. We cannot otherwise give effect to the words of the act. The statute requires, in order to defeat his claims as heir, not only that some provision should be made for such child, but that such provision should be made in the will of his parent.

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It provides, therefore, not only under what circumstances he shall inherit, the will notwithstanding, but how those circumstances shall be made to appear, viz.: by the will itself.

The defendants, who claim under the will to the exclusion of the after-born child, contend, that parol evidence is admissible, nevertheless, to show that the testator intended that the will should operate according to its provisions, and did intend to leave such child unprovided for; and seeks to apply to this case a rule of law not controverted, viz.: that when the law implies a revocation of a will from facts *dehors* the will, that revocation may be avoided by parol evidence of a contrary intent in the mind of the testator.

The argument here assumes, that the statute provisions only make the omission to provide for such child in the will a fact from which to imply an intent in the testator to revoke. In reply to this argument, two suggestions may be made: first, that the will is not revoked by the birth of such child. The act does not provide that it shall be, nor is it in any case entirely defeated in its operation, except where the child so born is sole heir. If there be other children, all the devises take effect, except so far only as to let in such after-born child to his share of the inheritance. The will stands and goes to probate, and it is another question how much estate passes by it. But, secondly, it may be said, that this provision of the act does not profess to frame a rule of evidence, but to declare a rule of law. It provides, that in a certain event, a child not provided for in the will shall inherit notwithstanding the will, and a share of the estate shall be assigned to him. The case of *Marston v. Doe d. Fox*, 8 A. & E. 14, was a case where the will was claimed to be revoked by the marriage of the testator and birth of a child after the making of the will. In that case, if there was any revocation, the whole will was revoked as to all the objects of the testator's bounty. Parol evidence was offered to show that the testator did not intend that the will should be revoked by the marriage and birth of issue. The opinion of the court was delivered by *Tindal*, C. J., rejecting the evidence; and upon the ground, that the will was

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not revoked from any implied intent to revoke, but that the revocation was the result of a rule of law; and that where it appeared that the will was executed before the marriage and birth of issue, and such issue was left unprovided for, either by the will or otherwise, the will became revoked by a tacit condition annexed to it when executed; that the revocation took place in consequence of such rule of law, independently of any question of intention of the party himself, and therefore, that parol evidence of acts, conduct, or declarations of the testator leading to the inference that he meant the will to stand, was not admissible to rebut the presumption of revocation. There was in fact no presumption of intent to be rebutted. Is an express statute provision less a rule of law, or more a rule of evidence? Is the rule that marriage and birth of a child revokes a will more express than this rule prescribed by the statute?

The cases cited by the defendants from the adjudged cases in Massachusetts, properly considered, do not support the position taken by the defendants. Their statute, passed in 1784, provides, that "any child or children, or their legal representatives in case of their death, not having a legacy given him, her, or them, in the will of their father or mother, shall have a proportion of the estate of their parents assigned to him, her, or them, as though such parent had died intestate; provided," &c. In the cases of *Foster v. Terry*, 1 Mass. 146; *Wild v. Brewer*; 2 Ib. 570; *Church v. Crocker*, 3 Ib. 17; *Wilder v. Goss*, 14 Ib. 359, decided under this statute, it was held, that if it appeared from the other parts of the will that the name of the child was not omitted from accident, forgetfulness, or mistake, but by design, the will should, though no legacy were given to the child, be carried into effect, and the child omitted should not inherit, and that such was the intent of the legislature. But in no one of these cases, nor in any case prior to the Revised Statutes of 1836, was it held, that evidence *aliunde* the will could be admitted to show the intent of the testator to exclude the child, and they all assume that it was inadmissible. In *Tucker v. Boston*, 18 Pick. 162, the supreme court of Massachusetts, by *Shaw*, C. J. who delivered the opinion of the court, express a strong doubt of the propriety of even those decis-

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ions, as the reasonable and true construction of the statute; but say "whatever we might have thought if now first called upon to expound the statute, the construction has been too long and uniformly adapted and settled as a rule of property, to be safely overturned." In *Bancroft v. Ives*, 3 Gray, 367, the reason for these decisions is intimated, as influenced by the preamble to the act, in substance the same passed in 12 William III. The preamble is there recited, setting forth the then existing evil which the legislature designed to remedy. The preamble was, "Whereas through anguish of the deceased testator, or through his solicitous intention, though in health, or through oversight of the scribe, some of the testator's children are omitted, and not mentioned in the will, many children also being born after the making of the will, though in the lifetime of the testator." With this clear expression of the existing evil, the court might well hold that it was sufficient to let in the heir against the will only in cases where it appeared from the will he was omitted by mistake, accident, or forgetfulness. We have no such light to direct us. Since these decisions, by the Revised Statutes of the state, this act has been altered and amended, and the proviso is added "unless it shall appear that such omission was *intentional*, and not occasioned by any mistake or accident." The case of *Wilson, Executor, v. Fosket*, 6 Metc. 400, has been decided upon the added words; and it has been held, that within this language parol evidence, even, may be admitted to show that the testator did not intend to make provision for the child which had been omitted. Parol evidence was admitted, because, as the court say, the party claiming the distributive share did not claim under the will, but under the statute. In effect, the court hold, that the words here prescribed a rule of law; and if it be made to appear, that the omission was by design, the child should not inherit, depending upon the proof of such design; and as the act did not prescribe any rule of evidence, that question might be determined by any evidence, which by the general principles of evidence would be relevant to such an issue. The statute leaves nothing to implication in the sense claimed by the defendants. It provides, not impliedly, but in express language, that if the omission be by

design, then by a rule of law the heir shall not be let in to inherit.

It is quite evident from a perusal of all these cases, both upon the original statute and as now amended, that were the question now for the first time raised upon the original act, especially had the preamble of the original act been omitted, parol evidence would not have been admitted, nor any evidence, to defeat the child omitted in the will; and that such an offer as was made by defendants in this case at the trial, would have been rejected.

It does not seem to us that the purpose of our statute of wills, much less the *main* purpose of that statute, is, as suggested by counsel, defeated by giving this construction to its sixth section, and excluding parol evidence of the testator's intent. It is true, that all the provisions of this act, all its several sections, should be so construed as to give effect to each, and, so far as may be, to make them all harmonize with the general purpose of the act. The argument assumes that the *main purpose* of the act is, to grant the testamentary power to the parent to devise his estate away from his children, and give it to such others as he will, and that it is not to be presumed that the legislature intended to limit or restrain this power, by confining it to such children as may then be born. Why is this not to be presumed when this is the language of the act? Why should we presume that the legislature did not intend what they so clearly express? The purpose of the act is not to give a parent an unlimited power. It is quite evident that it was designed to lay upon it many restrictions. The proviso of the first section begins with restricting the extent and duration of the estate to be created by the will. By the second section a further condition is imposed upon the power,—that the will of the parent shall only have effect if it be expressed in writing, signed by the testator in the presence of three subscribing witnesses,—notwithstanding the general power to devise to children, or to others, as he shall think fit. The sixth section is but another limitation upon this general power to devise to other than children, declaring that the inheritable share of an after-born child shall not be devised to others, unless some provision shall be made for such child in

the will which devises it away. This cannot be deemed an unreasonable restraint upon the power conferred by the first section. The parent is at liberty, so far as it respects all his children born at the time of executing his will, whose character, disposition, powers, and necessities, and probable wants, and what claims they may have upon him, may be supposed to be known to him, to devise what would otherwise be inherited by them to others; either with a view to their obedience and proper government, or to what he may deem best for them. There is certainly much less reason for allowing a parent to disinherit, and leave utterly unprovided for, a child of whose claims upon his justice, as well as his bounty, whose wants and necessities in life, from the nature of things, can neither be known or foreseen. At any rate, it is not so unreasonable a restriction upon the power of devising, that it should lead us to presume that it was not intended by the language used.

It is urged, in the argument, in favor of the admission of the parol evidence to establish the intent of the testator, that the admission of such evidence will not interfere with the statute of frauds, and that the evidence does not conflict with the will, and is only intended to confirm it. So far as the evidence offered by the defendants goes, it is offered in support of the will. We cannot suppose that a legislative body would allow evidence to be given by one side only upon any question depending upon evidence; and it is not pretended in this case that they did so intend. If they did not, then is the question open to proof, which must necessarily contradict the will, and show that the intent of the maker of the will was not what is expressed in the written language; and because this result would follow, the court, in *Marston v. Fox*, *supra*, excluded the evidence to prove or to disprove such intent. We think the reason assigned entirely satisfactory, and a sufficient answer to the position of the defendants.

Upon the whole, we are of opinion, that by the terms of the sixth section, the legislature intended to, and did, prescribe a rule of law, that if an after-born child is not provided for at all in the will, he shall be let into his share of the inheritance,

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and that without regard to the will or intent of the parent; and that therefore, no evidence of such intent is admissible to defeat the child.

The motion for a new trial in this case must be overruled, and judgment entered for the plaintiffs, for possession.

COUNTY OF BRISTOL, MARCH TERM, 1860.

SAMUEL VIALL & others v. ROBERT T. SMITH.

That a child was called and treated by a man and his family as his daughter, is presumptive proof of her legitimacy, and is admissible as evidence of the same, although the town registry of the father's marriage, compared with that of the daughter's birth, speaks a different language.

Where a town clerk, acting under the statute "for registering marriages, births, and burials," contained in the Digest for 1798, p. 486, recorded the fact of a marriage at a certain time, instead of recording the certificate to the fact of the official who joined the persons in marriage; *Held*, that a certified copy from such a registry was no proof of the time of marriage, unless traced by evidence to information furnished by the persons married or by members of their family.

A declaration by a father concerning his daughter, "that unless he made a will, Louisa could get nothing by law," is admissible as evidence tending to prove her illegitimacy; it being for the jury to pass upon the sense in which the father used the expression.

EJECTMENT by the plaintiffs, as heirs at law of Ebenezer Smith, late of Barrington, to recover one undivided sixth part of two tracts of land in said Barrington, of which the said Ebenezer died seised, intestate.

At the trial of the case under the general issue at the March term of this court, for the county of Bristol, 1859, before the chief justice, with a jury, it appeared that the plaintiffs, who were children and heirs at law of Louisa Viall, claimed by inheritance, through their said mother as a child of said Ebenezer, one undivided sixth part of his real estate. The seisin of said Ebenezer, and the death and intestacy of said Ebenezer

and said Louisa, being admitted, the plaintiffs, to support the issue on their part, called Lewis B. Smith, as a witness to prove that said Louisa, the mother of the plaintiffs, was brought up in the family of said Ebenezer, and was treated and spoken of by him and the other members of his family, as his daughter; whereupon the defendant produced and exhibited to the court, a certified copy of the record of marriages, births, and deaths, as recorded on pages 18, 19, and 20 of Book No. 2 for recording marriages, births, and deaths in said town of Barrington. On the nineteenth page of said book appeared the following: "Ebenezer Smith and Miss Martha Townsend were married September 4, A. D., 1800, by Rev. Samuel Watson. Louisa, their daughter, was born Saturday, August 23, 1800."

Upon the ground that said record was conclusive evidence of the times of the marriage of said Ebenezer and of the birth of said Louisa, the defendant objected to the testimony of the said Lewis B. Smith; but the court overruled the objection, and admitted the testimony of said Smith, and of other witnesses to the same effect, to pass to the jury.

To rebut the aforesaid evidence of the plaintiffs, and to prove that said Louisa was not the legitimate daughter of the said Ebenezer, but was born before his marriage with the mother of said Louisa, the defendant offered to prove the declarations of said Ebenezer, made in his lifetime, to the effect, "that unless he made a will, the said Louisa could get nothing by law;" but the court refused to allow proof of such declarations to pass to the jury.

The court further charged the jury, that the certified copy from the record of marriages in Barrington, which had been read to the jury, was not evidence tending to prove the fact or date of the marriage of said Ebenezer, because the original, as appeared from said copy, was not kept in compliance with the provisions of the statute in relation to the record of marriages then in force, and was not a record within the meaning of said statute; and that said copy did not tend to rebut the proof of the legitimacy of said Louisa submitted by the plaintiffs.

Under these rulings and instructions, the jury having returned

a verdict for the plaintiffs, the defendant now moved for a new trial, upon the ground that the same were erroneous in matter of law.

Payne, for the defendant.

The record should have been held conclusive until impeached. Though not a formal, it is a substantial compliance with the statute. Though not good as a record, it is competent evidence upon the same principle that inscriptions, &c., are used. 1 Greenl. § 105. The declaration of the father should have been admitted. 1 Greenl. §§ 103, 104, 134, and cases cited in the note.

Potter, (with whom was *Blake*,) for the plaintiffs.

1. The evidence that *Louisa* was treated and called the daughter of *Ebenezer Smith*, both by him and his family, was properly admitted.

2. The proof of the declarations of *Ebenezer Smith*, offered by the defendant, was not legally competent.

3. The certified copy from the records of marriages in *Barrington* showed that no record was kept in compliance with the then existing statute, for the registering of marriages, births, and burials. Dig. 1798, pp. 486, 487.

AMES, C. J. We see no reason to doubt the admissibility of the evidence offered by the plaintiffs to prove that their mother was the legitimate daughter of *Ebenezer Smith*, to wit, that she was called and treated as his daughter, both by him and by his family. Evidence from reputation in the family is clearly good upon a question of pedigree. *Goodright d. Stevens v. Moss*, Cowp. 591; *Vowles v. Young*, 13 Ves. 145-148; *White-locke v. Baker*, Ib. 514; *Doe d. Northey v. Harvey*, 1 Ry. & M. 297; *Jenkins v. Evans*, 10 Ad. & Ell. (N. S.) 314; *Jackson v. Browner*, 18 Johns. R. 39. Nor is this evidence objectionable if the registry of marriages and births in the town of *Barrington* speaks a different language, upon the notion that the latter, as record evidence, is, as long as it exists, the exclusive evidence upon this subject. Such a registry, though it may have more force, is of no higher legal degree, as evidence, than that which it was in this case invoked to exclude; being admissible, as a public document, upon the mere *prima facie* presumption of its correctness, because kept in the course of his official duty

by a person accredited by the public. 1 Starkie on Ev. 196, 300, (8th Am. ed.); *Jackson v. Boneham*, 15 Johns. R. 228. Indeed, as a registry of the marriage, we are of opinion that the registry here produced, because not such as the law required, has no force whatever as evidence. The statute in relation to such registries then in force, (Dig. 1798, pp. 486, 487,) required, by its *first* section, that all persons having authority to join persons in marriage should, immediately after the solemnization thereof, give a marriage certificate in a prescribed form; and by its *second* section, that the persons married should within a month, subject to a penalty for neglect, have the certificate registered in the town clerk's office of the town where the marriage was celebrated. The evidence of the marriage here provided is the certificate of the person authorized by law to join persons in marriage; and the registry was designed to perpetuate and make known this evidence. The marriage registry differs from that of births and deaths, required by the *third* section of the same statute to be kept by the town clerk, upon information to be furnished to him, in case of children, by the parents of the children born or dying. The town clerk of Barrington, whose registry is here produced, seems to have confounded these requirements; and to have recorded a marriage in the same manner that he did a birth or death — as a fact occurring within his own knowledge, or of which he is informed by others, or even by mere rumor. Certainly, this is not the kind of marriage registry which the law appointed him to keep, substituting, as it does, his own declaration, for the record of an official certificate. Such a document is presumed to be correct merely because kept by a public official in the course of his official duty; and if not so kept, how can such a presumption arise? Upon this ground, therefore, if the former was wanting, a marriage registry thus kept could not stand in the way of family repute, so as to exclude it as evidence.

It is suggested, however, that such a registry, though not kept as required by law, may be admitted as evidence of pedigree, upon the same principle that inscriptions upon monuments, or engravings upon rings are; and that is, as explained by Lord Erskine in *Vowles v. Young*, *supra*, that the family would not

permit such an inscription, if it were erroneous, and the person would not wear the ring, with a falsehood engraven upon it. The difficulty with this suggestion is, that it assimilates a town-clerk's entry, as a source of presumed family repute, with an inscription upon a family monument, or an engraving upon a family ring; that it confounds that which upon its face is the act of a stranger, with that which usually is, and therefore, in the absence of proof to the contrary, is presumed to be, the act of the family. No doubt, if this declaration of the town-clerk of Barrington, as to the time of Ebenezer Smith's marriage, was traced by proof to information furnished by him or by the members of his family, such sanction, by way of family repute, would render it admissible as evidence. But without such sanction, why is his written declaration not under oath—not made in the course of official duty, because not such as the law authorizes him to make—to be received in evidence, more than that of any other stranger to the family? In *May v. May*, 2 Stra. 1073, a book of daily entries of christenings, out of which the parish-clerk, once in three months, posted his entries into the parish registry, was rejected, when offered to prove that the plaintiff was illegitimate, by the letters "B. B." for "base-born" being added to his name; no such mark being against his name in the parish registry. Upon this case Mr. Starkie remarks, "If the entry in the day-book, which represented the plaintiff to be illegitimate, *had been made under the directions of the reputed father and mother*, the evidence would, it seems, have been admissible, as the declaration of a deceased parent. In the absence of such evidence, it appeared to be nothing more than a private memorandum, made for the purpose of assisting the clerk to make up the registry." 1 Starkie on Evid. 298, n. h, (8th Am. ed.) ; see also *Duins v. Donovan*, 3 Hag. 301. In no other light than as a private memorandum, can we regard the written declaration of the town-clerk of Barrington, here produced, as to the time of the marriage of Ebenezer Smith. Since he does not profess to record what alone by law he was authorized to record, what he has written must be regarded as his personal, and not his official act; and is not admissible in evidence without accompanying proof to connect

Franklin & others v. Wells.

it with information furnished by the family. As no such evidence accompanied the certified copy from the registry produced in this case, we are of the opinion, that the judge who presided at the trial committed no error, when he instructed the jury, wholly to disregard the copy, as evidence of the illegitimacy of Louisa Viall.

We do not think that the proof offered, on the part of the defendant, of the declaration of Ebenezer Smith, "that unless he made a will, Louisa could get nothing by law," points with certainty to her illegitimacy. It would be just as true if she had been fully advanced, as if she had been illegitimate. The meaning, however, of such an expression, depends so much upon the connection in which it is used, that it should have gone to the jury for them to judge, whether the speaker used it in the sense attributed to him by the defendant. The rejection of the proof precluded this right of the jury; and for this reason there must be a new trial of this case,—the costs to abide the event of the new trial.

COUNTY OF KENT, MARCH TERM, 1860.

JOSEPH P. FRANKLIN & others v. JOHN WELLS.

Upon an application to a fence-viewer of a town, under the 8th section of chap. 91, of the Revised Statutes, to settle a controversy about the rights of occupants of land in partition fences, and their obligation to maintain the same, all that the fence-viewer can do is, after due notice, to determine the rights of the respective parties, by assigning to each his share of the fence, and to direct the time within which each shall erect or repair the same; and he cannot, upon such application and notice, proceed to mulct either party for neglecting or refusing to obey his order.

To warrant the proceedings under the 5th section of the same statute, it is necessary that there should be a complaint to the fence-viewer of the neglect or refusal by an occupant to rebuild or repair his share of a partition fence, and a determination by the fence-viewer, after due notice to the party complained against, that the complaint is true, and an assignment of a time within which the neglecting party may perform his duty; and

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although no notice is, in terms, required by the statute to be given to the delinquent occupant, when, under the provisions of the 6th section, the fence-viewer proceeds to ascertain the cost to the complainant of rebuilding or repairing the fence, yet such notice is required by the principles of natural justice, and the judgment and certificate of the fence-viewer will be void without it.

THIS was an action of the case, originally brought before a justice of the peace, to recover the sum of \$39.54, with interest thereon at the rate of twelve per cent. per annum, under ch. 91, sect. 6, of the Revised Statutes, for double the cost of repairing a partition fence, and of the fence-viewer's fees, which fence had been ordered to be repaired by the defendant by a fence-viewer of the town of East Greenwich.

The case came by appeal to the court of common pleas for the county of Kent, and at the August term of said court, 1859, was tried before Mr. Justice *Shearman*, with a jury. At the trial, the plaintiffs produced, in maintenance of the action, the following certificate of Caleb W. Gorton, a fence-viewer of the town of East Greenwich :—

“ *East Greenwich*, Oct. 17, 1857.

“ The undersigned, one of the fence-viewers in and for the town of East Greenwich, hereby certifies: that upon the application of Joseph P. Franklin and wife, and Almira Vaughn of said East Greenwich, to view and divide the partition fence between the lands of the applicants and John Wells, lying in said East Greenwich, I did, after due notice to each party, on the 21st day of August, 1857, view the same, and assign to each party the half part thereof which they should build, and did in writing require said Franklin and Almira Vaughn and John Wells to build their portion of said fence so assigned to them, within fifteen days thereafter; and such order having been complied with by said Franklin and Vaughn, and not complied with by said Wells, I did order said Franklin and Vaughn to build the half part of said partition fence belonging to said Wells to build; and said Franklin and wife and Almira Vaughn having completed said last mentioned half part of said partition fence to my satisfaction, I have ascertained the cost thereof to be as follows :—

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One hundred and sixty-five rails,	\$9.90
One hundred and six stakes,	2.12
Carting same,	2.50
Building said fence, two and a half days,	2.50
My fees,	1.50
Paid for recording,20
Time and expense to village,80
Certificate to Franklin,25
	<hr/>
	\$19.77
	2

 Double, \$39.54
 (Signed)

CALEB W. GORTON, Fence-Viewer."

In addition to this certificate, the plaintiffs produced in evidence the assignment of the fence to each party, in writing, under the hand of the fence-viewer; and the fence-viewer certifying to his notice of the date of the 21st of August, 1857, the same was duly recorded in the town clerk's office of East Greenwich. He also produced the fence-viewer's certificate to leaving the same at the house of the defendant, with his wife, on the 5th day of September following; and it appeared that it was delivered to Franklin upon the day of its date. The court ruled, against the objection of the defendant and rejecting proof offered by him in contradiction of the facts, and especially of the notices stated in the certificate, that the certificate of the fence-viewer was conclusive as to all the facts stated therein, and that said certificate contained all that was necessary to support the plaintiffs' action except a statement of the demand required in the 6th sect. ch. 91 of the Revised Statutes, to which proof on both sides was received. A verdict having been rendered for the plaintiffs, the defendant now brought his exceptions to the errors of law therein, to this court.

Peck, for the defendant.

Cozzens, for the plaintiffs.

BRAYTON, J. In the case before us, the court ruled, that the certificate of the fence-viewer contained all the facts necessary to sustain the plaintiffs' action, except evidence of the demand of payment of the defendant of the damages ascertained.

The application made to the fence-viewer, as stated in his certificate, and upon which all these proceedings were had by him, was made by the plaintiffs, requesting the fence-viewer to view and divide the fence between the plaintiffs and the defendant. This was made under the 8th sect. of ch. 91, of the Revised Statutes, "Of fences." This section provides, that "when any controversy shall arise about the rights of the respective occupants in partition fences and their obligations to maintain the same, either party may apply to a fence-viewer of the town where the lands lie, who, after due notice to each party, may, in writing, assign to each his share thereof, and direct the time within which each party shall erect or repair his share of the same; which assignment, being recorded in the town clerk's office, shall be binding upon the parties and all succeeding owners and occupants of the land; and they shall be obliged always thereafter to maintain their respective shares of said fence, until the right of the respective parties shall be determined differently in some proper action." Upon an application under this section, which supposes the rights and liabilities of the parties to be in dispute, the authority of the fence-viewer goes no farther than to ascertain and settle these rights and liabilities, by assigning to each party his share of the partition fence. This section contemplates no further action of the fence-viewer. It is true, he may direct the time within which the parties shall build or repair the part assigned them, but this section does not authorize him to enforce a compliance with that direction. His proceeding under this section is merely to fix the obligation of the parties and the extent of it, and here it leaves the subject.

The 5th section of this chapter provides for cases where no controversy is supposed to exist about the rights of the respective occupants of the fence, but where the duty to maintain the fence is ascertained and settled, and it provides, that "When any proprietor or possessor of land shall neglect or

refuse to repair or rebuild any partition fence, or shall withdraw his fence from any division line, the aggrieved party may complain to any fence-viewer of such town; who, after due notice to such party, shall attend and view the same; and if he shall find said complaint to be true, he shall, in writing, require the delinquent party to repair or rebuild the same within such time as he shall therein appoint, not exceeding fifteen days."

To authorize any proceeding by the fence-viewer, either to compel the party to build or repair, or to mulct him in damages for neglect, there must be a complaint that he has neglected or refused to build or repair the partition fence; and upon that complaint, not upon some other, notice must be given to the party complained against that such complaint has been made, and of the time appointed by the fence-viewer to view the fence; and having given such notice, the fence-viewer must adjudge the complaint so made to be true; and if he find it to be true, he is to assign a time within which the party may still perform his duty by building.

The sixth section provides, that if this order be not complied with, and the party still neglects, the complainant may rebuild or repair, and shall do it to the satisfaction of the fence-viewer, who is to judge whether it is properly built. If satisfied upon this point, he is required to ascertain the cost of building, together with his own fees, and to give a certificate thereof to the complainant. No notice is, in terms, required to be given the delinquent party to be present, or to be heard upon the assessment of these damages against him; but upon a similar statute in Massachusetts, and one from which this was probably copied, it has been held, that the precepts of natural justice require such notice, and that such notice is necessarily implied. *Scott v. Dickinson*, 14 Pick. 276; *Lamb v. Wicks*, 11 Metc. 496. Having adjudged then, upon notice to the delinquent party, what the cost of rebuilding has been, and having given to the complainant the certificate of the amount so adjudged, the complainant is authorized, but not until these several judgments upon notice have been made, to demand of the defendant the amount adjudged, and upon refusal by him to pay, to maintain a suit therefor.

Now it does not appear from the certificate of the fence-viewer, that any complaint was made by the plaintiffs that the defendant had neglected or refused to repair the division fence; nor does it appear therefrom that any notice was given to the defendant that any such complaint was made against him,—or that the fence-viewer intended to view the fence, at any time, in order to determine if he had refused or neglected to build or repair,—nor has the fence-viewer certified that he found any complaint against the defendant to be true, much less a complaint that he had neglected and refused to build the partition fence. Neither does it appear, that before proceeding to ascertain the cost of the fence built by the plaintiffs, that he gave any notice to the defendant that he might be heard in the assessment of damages. If any one of these requisites be wanting, the plaintiffs cannot maintain their action, even though a regular demand were made upon the defendant, and on a day to which there could be no objection. With these omissions of facts necessary to the support of the plaintiffs' action, apparent from the certificate of the fence-viewer, it was an error in the court to rule that it contained all that was necessary to support it; and for this cause there must be a new trial. Whether it was competent for the defendant, by evidence, to contradict the certificate in its statement that notice was given the defendant of the application to view and divide the partition fence, it is not necessary now to consider; because, if such notice had been given, the plaintiffs could not recover. Neither is it material to determine, whether the demand made by the plaintiffs upon the defendant was, or was not, legally made; since there was nothing legally adjudicated which they could of right demand.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT

FOR THE
COUNTY OF PROVIDENCE, MARCH TERM, 1860,
AT PROVIDENCE.

PRESENT :
HON. SAMUEL AMES, CHIEF JUSTICE.
HON. GEORGE A. BRAYTON, } JUSTICES.
HON. ALFRED BOSWORTH, }

CHARLES T. JAMES & WIFE v. THURSTON, GARDNER & Co.

Upon a petition for the removal of a cause from a state court to a court of the United States, the former has no discretion to refuse *one entitled* to the jurisdiction invoked; but a judicial discretion merely to decide and declare whether the petitioner is thus entitled.

A party plaintiff, who although not indispensable to the maintenance of a bill in equity, is nevertheless entitled upon the face of the bill to a decree, cannot, for the purpose of removal, be regarded as no party to the bill; the criterion of a mere nominal party, for such purpose, being, whether the party is entitled or subject to a decree; and therefore, where such a party was co-plaintiff with others, but not, like them, a citizen of the state in whose court the suit was brought, his presence was held fatal to a petition by the defendants for the removal of the cause into a circuit court of the United States, although, but for this objection, they would have been entitled to remove it.

PETITION to remove a bill in equity, filed by the respondents against the petitioners and Thomas A. Jenckes, from this court, to the circuit court of the United States for the Rhode Island district.

At the hearing it appeared, that the respondents were execu-

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tion creditors of the petitioner, Charles T. James, who had attached on their writ, and levied their execution upon, certain real estate formerly belonging to James, but now standing in the name of the other petitioner, his wife, which real estate had been purchased in by Henry W. Gardner, one of the respondents, for the benefit of the firm, at the sheriff's sale under the levy. Having thus acquired James's title to the estate, the respondents, consisting of Robert L. Thurston, Henry W. Gardner, and Gideon G. Hicks, citizens of Rhode Island, and Alfred R. Fiske, a citizen of Pennsylvania, filed the above bill against James and his wife, citizens of New York, Alexander Duncan, a mortgagee of the estate under a mortgage of admitted validity executed prior to the attachment, who was a citizen of Rhode Island, and Thomas A. Jenckes, alleged in the bill to be a mortgagee of the estate since the attachment, and who was a citizen of Rhode Island, charging, in substance, that Mrs. James's title to the estate was acquired by her husband's means, and in secret trust for him, and, as well as Jenckes's mortgage, was now set up in fraud of James's creditors, — he being greatly insolvent; and praying, that the court would declare this trust, and establish against it and the mortgage to Jenckes, their title under the sheriff's deed, or, in some way subject the estate to the payment of their judgment.

To this bill, the respondent, Jenckes, had made answer admitting that James and his wife had executed to him such a mortgage as was alleged in the bill, but disclaiming all interest in the mortgage, or in the subject of the suit at the time when the bill was filed; and alleged, that long anterior to the suit, he had assigned his mortgage to one Horace H. Day, who, at the time of the filing of the bill, was the exclusive owner thereof and of the debt secured thereby. No exceptions were taken to this answer or replication filed thereto, and the time for either had, under the rules of the court, long since passed.

In this state of things, James and his wife, at the time of entering their appearance to the bill, now filed this petition for its removal to the circuit court of the United States for the Rhode Island district, offering the usual bond with sufficient surety.

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T. A. Jenckes, for the petitioner.

The question is within the exclusive jurisdiction of the courts of the United States, and must be governed by its decisions. *Kanouse v. Martin*, 14 How. 23; *Gordon v. Longest*, 16 Pet. 97. The co-defendant Jenckes, having disclaimed all interest in the subject of controversy, his joinder as a defendant cannot affect the right of his co-defendants to the jurisdiction invoked by their petition. *Head v. Vattier*, 1 McLean's Rep. 110; *Same v. Same*, 7 Peters, 252, 262. His joinder cannot affect the jurisdiction, since it was wholly unnecessary to join him, and no decree can be had against him. *Livermore et al. v. Jenckes et al.*, 11 Howard (N. Y.) Pract. Rep. 479. Day, the assignee of the mortgage, who is a citizen of New York, can be made a party, without disturbing the jurisdiction invoked. *Smith et al. v. Kernochan*, 7 How. 198, 215, 216. The bill discloses that Gardner, the purchaser at the sheriff's sale, is the sole necessary party plaintiff; and the other parties plaintiff, his *cestuis*, being unnecessary, should, for the purpose of removal, be treated as if no parties to the bill.

Thurston, for the respondents.

The citizenship of Alfred R. Fiske, one of the plaintiffs, he being a citizen of Pennsylvania, forbids the removal; since, in order to it, all the plaintiffs must be citizens of the state in which the suit is brought. 1 U. S. Stats. at Large, 79.

Jenckes, a citizen of Rhode Island, having had an interest in the mortgage, which he took, as charged in our bill, with full knowledge of our lien by attachment, is a proper party to the bill; Story, Eq. Pl. § 190; and his joinder equally forbids the removal sought.

AMES, C. J. It is true, as suggested by the counsel for the petitioner, that this court has, under the constitution and laws of the United States, no discretion to forbid one entitled to the jurisdiction of the courts of the United States to remove his cause thither. Our discretion, which is judicial merely, is confined to the ascertainment and declaration of his right to the jurisdiction; that being ascertained, the right to remove follows as a matter of course.

Two objections are made by the plaintiffs to this bill to the

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change of jurisdiction invoked by the defendants, Charles T. James and wife; 1st, that Fiske, a party plaintiff, is a citizen of Pennsylvania; and, 2d, that Jenckes, a party defendant, is a citizen of Rhode Island; whereas, by the well-established rule in construction of the 12th section of the Judiciary Act of the United States, all the plaintiffs must, in order to removal, be citizens of the state in whose court the suit is brought, and all the defendants be aliens, or citizens of some other state or states of the United States. *Strawbridge v. Curtis*, 3 Cranch, 267; *Ward v. Arredondo*, 1 Paine, 410; *Goodyear v. Day*, 1 Blatchf. 565. To the first objection it is replied, that Fiske was not a necessary party plaintiff to the bill, as the bill itself shows; since the court might and would have given the same relief if the bill had been brought by Gardner alone, without joining his copartners, for whom he purchased at the sheriff's sale in trust. This reply, it will be perceived, assumes, that if this bill might have been sustained in the courts of the United States by Gardner alone, without his *cestuis*, it is now to be treated, for the purpose of removal, precisely as if he had not joined them as co-plaintiffs. We see no just ground for this assumption. Undoubtedly, mere formal parties, or unnecessary parties, such as are entitled to no decree as plaintiffs, or against whom no decree can be rendered, as defendants, are not to be treated as parties, though joined, upon the question of removal. If they were, the jurisdiction of the courts of the United States might be evaded in numerous cases proper to it. But this is as far as any case which we have seen has gone, and as far as we think any case ought to go. "The criterion," says Mr. Justice Thompson, "as decided in *Wormley v. Wormley*, 8 Wheat. 451, by which it is determined whether a party is nominal or not, is whether a decree is sought against him." *Ward v. Arredondo*, 1 Paine, 412, 413, and see *Livermore & others v. Jenckes & others*, 11 Howard (N. Y.) Pract. Rep. 479. Beside indispensable parties to bills, there is a class of parties, who, although their interests are so separable from those of others that even if they were not before the court the court might do complete justice to those who were before it, are, nevertheless, entitled to join in suits commenced to assert the joint interest, and to have their

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rights adjudicated in them. With regard to such parties, the courts of the United States, before the statute of February 28, 1839, allowed plaintiffs to dispense with them for the purpose of assuming jurisdiction, and especially where they could not be served as defendants; and the statute, so far as equity cases are concerned, seems to be nothing more than a legislative affirmation of previous decisions upon this subject. *Shields et al. v. Barrows*, 17 How. 130, 139-142, and cases cited. But though such parties need not be joined, yet where entitled or subject to a decree, they certainly may properly be joined; and if they are, no court is entitled, against their will, to dismiss them, or to treat them, for the purposes of jurisdiction, as if they were not parties to the suit. They have a right to a decree, and have sought it in the proper manner, and in the proper place, where they can have it; and it would be cold justice to turn them over to a tribunal which cannot give it to them, — whose very jurisdiction must depend upon dismissing them from a bill, under which, according to the principles of equity, they are entitled to relief as parties.

Precisely such a party as this, appears to us to be the plaintiff, Fiske. He was a member of the firm of Thurston, Gardner & Co., the plaintiffs in the execution levied upon the land in question, and therefore interested in the result of that levy. It was quite proper that when Gardner, another member of the firm, bid in the land levied on, he should do so for the common interest, and hold the purchase for the common benefit. This the bill asserts that he did; and Fiske, as well as the other members of the firm, is therefore properly joined in the suit, as a plaintiff, to assert their joint rights acquired by the levy, and to participate in the decree here sought. It is not for this court, or for any court, to treat a party who properly pursues his remedy, and who is, so far as shown, entitled to a decree, as if he were no party; or to deny to him his lawful remedy where he has chosen to have it, and where alone, in the accustomed manner, he can have it.

As the presence of the plaintiff, Fiske, as a party to this bill, is fatal to this petition, it is unnecessary to consider the other objection to removal, in the joinder of the defendant, Jenckes. The petition must be dismissed, with costs.

Thornton & others v. Town Council of North Providence.

SIMEON E. THORNTON & others v. TOWN COUNCIL OF NORTH PROVIDENCE.

Where the owners and their lessees of lands, through which a highway is laid out, unite in an appeal from the decree of the town council laying out the highway, upon the grounds, that the highway was unnecessary, and that no damages were awarded to them, and at the trial of the appeal claim joint damages, it is no matter in arrest of judgment, that separate damages have not been assessed to them.

APPEAL from a decree of the town council of North Providence laying out a highway in said town through lands of the appellants; the reasons of appeal complaining both of the laying out of the highway, and that no damages had been awarded to the appellants.

On the trial of the appeal before Mr. Justice *Shearman* with a jury, at the December term of the court of common pleas for the county of Providence, 1859, it appeared, that the appeal was jointly taken by Simeon E. Thornton, as guardian of the persons and estates of Almira W. Thornton, Charles T. Thornton, and ——— Thornton, minor heirs of Jesse S. Thornton, late of North Providence, as owners of certain lands in North Providence, and by Simeon E. Adams and William T. Adams, lessees and occupants of said lands. The jury found the highway to be necessary, and assessed to the appellants, jointly, the sum of two hundred and fifty dollars as their damages; no request having been made by the appellants, at the trial, for separate trials or assessments of damages, and neither the attention of the court or jury having been called to the subject of such separate assessment at the trial, or upon the coming in of the verdict.

The appellants thereafter, at the same term of the court of common pleas, filed a motion in arrest of judgment, upon the ground that separate damages should have been assessed, which the judge below having overruled, the matter was now brought to this court by exceptions to the above ruling; all other matter of exception embraced in the bill having been waived.

Weeden, for the appellants.

Brown & Van Slyck, for the appellees.

 Barrows v. Knight.

BOSWORTH, J. The judge below rightly refused the motion in arrest. The appellants joined in their appeal and in their claim for damages upon the trial, and there is nothing upon the record on which to ground such a motion. After verdict, everything necessary to support it which could have been admitted to proof under the declaration or claim, must be presumed to have been proved.

It may have been more convenient for the appellants, in dividing the damages recovered, to have had them separately assessed; but as they have united in their appeal and claim for damages, and the whole damages they have sustained have been assessed to them in the manner in which they sought them, we see no reason why the judgment should have been arrested. It would be manifestly unjust to the other party to subject them to the trouble and expense of another trial, when the verdict is rendered in accordance with the issue raised by the party moving in arrest. The exception must be overruled, and the case left to stand upon the judgment rendered in the court of common pleas upon the verdict.

CORNELIUS BARROWS v. B. B. & R. KNIGHT.

The name of "Roger Williams Long Cloth" is capable of being appropriated by a manufacturer to cotton cloth of his manufacture, to distinguish it from cloth of the same general description manufactured by others; and if, to the knowledge of the public, it be so appropriated by the plaintiff, a person who stamps the name of "Roger Williams" on his cloth of similar description, with the design and effect of fraudulently passing it upon the market as and for cloth manufactured by the plaintiff, to the lessening of the gains and credit as a manufacturer of the latter, is liable to him for the injury caused thereby.

DEMURRER to a declaration in case, for fraudulently imitating the plaintiff's trade-mark. The declaration was as follows:—

"*Providence Sc.* Supreme Court, March Term, 1860.

"Cornelius Barrows of Providence in said county, manufacturer, complains of Benjamin B. Knight of Attleborough, in the State of Massachusetts, and Robert Knight 2d, of Cranston in

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said county of Providence, copartners, doing business as manufacturers and bleachers in Providence, in said county, under the name and style of B. B. & R. Knight, summoned by the sheriff in an action of the case; for that the plaintiff, for a long space of time before, and at the time of committing the grievances hereinafter complained of, carried on the business of manufacturing cotton cloth, and made and sold for profit a large quantity of cotton cloths which he was accustomed to mark with the words "*Roger Williams Long Cloth*," in order to denote that they were manufactured by him the plaintiff, and to distinguish them from goods of the same description manufactured by other persons.

And the plaintiff says that he enjoyed great reputation with the public on account of the good quality of the said goods so manufactured by him, and made great gain by the sale of them; yet the said defendant, well knowing the premises, but wickedly, wrongfully, and unjustly intending to injure the plaintiff in his aforesaid business and sale of his goods, and to deprive him of the gain and profit he would otherwise acquire, to wit: on the first day of May, A. D. 1858, and on divers other days and times between that day and the day of the commencement of this suit, to wit: at Providence, did wrongfully, knowingly, injuriously, deceitfully, and fraudulently, against the will and without the license or consent of the plaintiff, mark and stamp, and cause to be marked and stamped, a great quantity of cotton cloth manufactured by them the defendants, and purchased and belonging to them the defendants, and bleached by them the defendants, with the words "*Roger Williams*," in imitation of the said mark and stamp of the plaintiff, and in order to denote that the said cloth so manufactured by them the defendants, and so purchased and belonging to them, and bleached by them, was of the manufacture of the plaintiff; and did knowingly, wrongfully, and deceitfully, on the several days and times aforesaid, sell for their own lucre and gain the said cloth so manufactured, purchased, and bleached as aforesaid, and marked and stamped as aforesaid, as and for cloth of the manufacture of the plaintiff, whereby the plaintiff was prevented from selling a great quantity of cotton cloth manufactured by him, and

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thereby defrauded of great gain and profit which would otherwise have accrued to him from the sale thereof, and greatly injured in reputation; the said cloth so manufactured, purchased, bleached, and sold by the defendant being greatly inferior to that manufactured by the plaintiff; to the damage of the plaintiff five thousand dollars as laid in his writ dated the 9th day of October, A. D. 1859. Wherefore he sues, &c."

To this declaration there was a general demurrer and joinder. *Markland*, for the defendant.

There are two objections to this declaration: it shows no trade-mark, in the legal sense, adopted by the plaintiff, and no imitation of that which is set forth as the plaintiff's trade-mark, on the part of the defendant.

1st. The plaintiff has no right to appropriate the name "Roger Williams," as descriptive of his cloth, so as to exclude the defendant from the use of it. It is not the plaintiff's name, or the name of the article manufactured, nor is it symbolical of either; but a common name, merely, which the defendant has as much right to use as the plaintiff. *Amoskeag Manufacturing Co. v. Spear*, 2 Sandf. Sup. Ct. Rep. 599; *Rogers v. Nowill*, 17 Eng. L. & Eq. Rep. 83; *Marsh v. Billings*, 7 Cush. 322. The words "Long Cloth," employed by the plaintiff in connection with the name, does not help him; it is merely descriptive. *Stokes v. Landgraff*, 17 Barb. (N. Y.) Rep. 608.

2d. The mark used by the defendant must so closely resemble that used by the plaintiff as to be calculated to deceive, and to induce persons to believe the defendant's goods to be of the plaintiff's manufacture. *Davis v. Kendall*, 2 R. I. Rep. 566; *Ames v. King*, 2 Gray, 379. There is no such resemblance between "Roger Williams," used by the defendant, and "Roger Williams Long Cloth," claimed as his trade-mark by the plaintiff. To entitle him to go to the jury upon the question of imitation, the plaintiff should have framed his declaration specially, as in *Marsh v. Billings*, 7 Cush. 322. In a case of this sort, the questions of fraud and injury, as appears from *Davis v. Kendall*, *supra*, are not open to inquiry, although the matter would not seem to be free from doubt. *Flavell v. Harrison*, 19 Eng. L. & Eq. Rep. 15; *Taylor v. Carpenter*, 2 Sandf. Ch. Rep. 603, et

seq.; 2 Story's Eq. Jurisp. 951 *a*, and notes. If the questions of fraud and injury are not open, the allegations in the declaration, in that behalf, do not help the plaintiff to the jury.

Hart, for the plaintiff.

A manufacturer, by priority of appropriation, may acquire a property in any words, marks, figures, devices or symbols, designed to indicate the origin or ownership of the goods or the particular place of business of the manufacturer, for the invasion of which an action for damages will lie. But in words, marks, &c., which indicate simply the name, nature, kind, or quality of the goods, no property can be acquired. *Amoskeag Manufacturing Co. v. Spear*, 2 Sand. Sup. Ct. Rep. 628; *Coats v. Holbrook*, 2 Sandf. Ch. Rep. 586; *Taylor v. Carpenter*, 2 Sandf. Ch. Rep. 603; *Stokes v. Landgraff*, 17 Barb. 608; *Sykes v. Sykes*, 3 B. & C. 541; *Davis v. Kendall*, 2 R. I. 566; 2 Hilliard on Torts, 206, *et post*, and cases cited. Though the imitation be only colorable or partial, if calculated or likely to deceive, an action will lie. *Amoskeag Manufacturing Co. v. Spear*, 2 Sand. Sup. Ct. Rep. 599; *Partridge v. Menck*, 2 Sandf. Ch. Rep. 622; *Davis v. Kendall*, 2 R. I. 566; *Coffeen v. Brunton*, 4 McLean, 516. See also on this point, 2 Hilliard on Torts, 207, 208; 2 Story's Eq. Jurisp. (7th ed.) 258, 259, and cases cited. Whether or not the alleged imitation is likely to deceive, is a question of fact for the jury. It is sufficient here if the declaration discloses a partial imitation. An examination of the cases where injunctions have been refused or actions not maintained shows the mark to have been used to indicate the name, nature, kind, or quality of the articles, or where a manufacturer, selling an article under his own name, has sought to prevent the use of the name or title of the article by another person having the same name with himself. See *Burgess v. Burgess*, 17 Eng. L. & Eq. 257; *Gillott v. Kettle*, 3 Duer, 624; or where there has been some fraudulent representation on the part of the plaintiff, as in *Pedding v. How*, 8 Simons, 477; or *Perry v. Trufurt*, 6 Beavan, 66; or *Flavell v. Harrison*, 19 Eng. L. & Eq. 151, cited by defendant's counsel.

AMES, C. J. It never could have been a question that a designed imitation by the defendant of the trade-mark of the

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plaintiff, whereby the former fraudulently passed off his goods in the market as goods manufactured by the latter and to his injury, would support an action. Indeed, such a concurrence of fraud and injury constitutes the most flagrant form of this species of wrong; and this court can with no justice be said to have intimated the contrary, when it recognized in *Davis v. Kendall*, 2 R. I. Rep. 570, that equity would restrain the invasion of a trade-mark as well when the consequence of mistake, as when contrived of fraud. The declaration before us charges the defendant with the worst form of this species of tort:— that he knowingly and fraudulently stamped his goods with the words “Roger Williams,” in imitation of the trade-mark of the plaintiff, in order to denote that they were manufactured by the latter, and knowingly and deceitfully sold his cloth, so stamped, as and for cloth manufactured by the plaintiff to the lessening of the plaintiff’s sales, and credit as a manufacturer of cotton cloth.

It is argued, however, that the declaration does not set forth, in the name “Roger Williams Long Cloth,” as applied by the plaintiff to distinguish cotton cloth manufactured by him, that which can legally be a trade-mark; since it is neither the name of the plaintiff, nor descriptive of the nature or qualities of the article manufactured by him, nor is it symbolical of either. We are not aware of any legal restriction upon a manufacturer’s choice of a name for his trade-mark, any more than of his choice of a symbol, so that the name be so far peculiar, as applied to manufactured goods, as to be capable of distinguishing, when known in the market, one manufacturer’s goods of a certain description from those of another. “Roger Williams,” though the name of a famous person, long since dead, is, as applied to cotton cloth, a fancy name, as would be so applied, the names of Washington, Greene, Perry, or, of any other heroes, living or dead. It is quite as peculiar and significant, in such an application, as “Persian Thread,” “Mexican Balm for Hair,” “Vegetable Pain-Killer,” “Houqua’s Mixture,” for tea, or “Ethiopian,” for stockings, or the numerous other fanciful names which have been treated as appropriate trade-marks. *Coats v. Holbrook*, 2 Sandf. Ch. Rep. 559, note of

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cases. Now, the declaration states that the plaintiff had long used this name, stamped upon his cotton cloth, to distinguish his cloth from cloth of the same description manufactured by others, and enjoyed great reputation with the public on account of the good quality of the goods by him manufactured, and made great gains by the sale of them. If this was so,—and whether it was must be matter of proof to the jury,—it is clear, that the defendant had no right to defraud him of his profits or good name, by falsely and deceitfully passing off his own goods for those of the plaintiff, whether by verbal misrepresentations, or by imitating any mark put upon them by the plaintiff by which the public could, and were accustomed to, identify them.

The declaration further alleges, in substance, that the defendant, well knowing the plaintiff's said mark, and for the purpose and with the effect of such deception, did stamp the words "Roger Williams" upon cotton cloth not manufactured by the plaintiff, and to his serious injury. Certainly under the rule, so well settled, that a partial imitation of a trade-mark, if calculated to deceive will support an action, this is a sufficient allegation of an invasion of the plaintiff's rights. The court cannot, as a matter of law, decide that such partial use of the designation of his goods appropriated by the plaintiff was not designed, calculated, and effectual to carry out the fraud charged, and must leave that, as well as the prior allegation, to be settled upon the evidence by the jury.

The demurrer is therefore overruled; but under the agreement of the parties, suggested at the argument, the defendant has leave to withdraw his demurrer without costs, and to plead over to the merits.

GIDEON NYE v. GEORGE C. NIGHTINGALE, Assignee.

An assignee for the benefit of creditors, a citizen of the State of Rhode Island, filed a bill in equity in the state court, against a Massachusetts creditor of his assignor, who had obtained a state execution, and the officer charged with the service of the execution,

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who was a citizen of Rhode Island, to establish his trust, and to enjoin the sale of the trust property levied upon by the execution. Upon a petition by the execution creditor to remove the bill into the circuit court of the United States for the Rhode Island District, *Held*: that the officer was not a formal, official, or unnecessary party to the bill, so that his being a co-defendant could be disregarded by the court in considering whether the applicant was entitled to the jurisdiction which he invoked; and that the petition must be dismissed.

PETITION for the removal of a bill in equity from this court to the circuit court of the United States for the Rhode Island District. It appeared, that at the December term of the court of common pleas for the county of Providence, 1858, the petitioner, who is a citizen of the State of Massachusetts, obtained a judgment against Zachariah Allen, for the sum of \$3290.04, debt, and costs of suit, taxed at \$5.70. On or about the 19th day of August, 1859, by the death of his sister, Ann, intestate, Allen, who was greatly insolvent, succeeded, as one of her heirs, to one undivided fifth part of her real estate, and became entitled, as one of her next of kin, to one fifth part of her personal estate; and on the same day assigned all his right, title, and interest in his said succession to the respondent, Nightingale, in trust for the benefit of his creditors, with certain preferences. The assignee, Nightingale, on the same day, placed the deed of assignment on record, accepted the trust, and was proceeding to execute the same, when, on the 29th day of September, 1859, the petitioner, having taken out execution on his said judgment, placed the same in the hands of Roger Williams Potter, a deputy sheriff of the county of Providence, and a citizen of the State of Rhode Island, and caused the same to be levied upon all the real estate to which, as above, the defendant in execution, Allen, had recently succeeded, and which he had assigned, as aforesaid, for the benefit of his creditors. Under these circumstances, the respondent, Nightingale, filed in this court the bill now sought to be removed, against the petitioner and Potter, the officer, setting forth the above facts, praying for instructions and protection, that his trust might be established, and the petitioner and the officer Potter be enjoined from embarrassing the trust, or proceeding to sell the trust property levied on under said execution. The sale under the execution being imminent, the bill was accompanied by a petition for a

preliminary injunction against the sale, which, after a hearing of the same matter upon similar proceedings had by the assignee against another attaching creditor, for whom the counsel for the petitioner appeared and acted, was granted. No appearance was entered to this bill, or opposition made to the injunction; the counsel for the present petitioner, upon the granting of the injunction, merely ordering the officer, Potter, to adjourn his sale to a time certain, in order to keep alive the levy until the bill could be finally heard and disposed of. It was this bill, with the injunction thereon pending, which the petitioner now sought to remove.

T. A. Jenckes, for the petitioner.

There is no objection to the removal except the fact that Potter, the deputy sheriff, is a party defendant. He is an official party merely, not a necessary one, and, for the purposes of jurisdiction, should not be regarded. *Browne & others v. Stode*, 5 Cranch, 303; *McNutt v. Bland et al.* 2 How. 1; *Huff et al. v. Hutchinson*, 14 How. 586; *Wormley v. Wormley*, 8 Wheat. 421, 451; *Harrison, Adm'r, et al. v. Urann et al.* 1 Story, 64.

There was no necessity for this bill for the purpose of enjoining this execution, since the court of common pleas, out of which it issued, has full power over its own process.

Wm. H. Potter, for the respondent.

1. The petitioner, having brought his action in a state court and obtained its process, has submitted himself to the jurisdiction, and cannot, because he has been enjoined by this court from misusing the state process, procure a dissolution of the injunction by removing the case into the circuit court, which has no power, by the judiciary act of the United States, to grant such an injunction. He has elected the state courts as the tribunals for the decision of the subject-matter of his suit, and this bill is ancillary merely to the suit originally commenced by him in the state court. (The case of *Dunn et al. v. Clarke et al.* 8 Peters, 1, was referred to by the court.)

2. The officer, Potter, is a necessary party to the relief sought; and being a citizen of Rhode Island, and a co-defendant with the petitioner, the suit cannot be removed.

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3. The decree or order for a preliminary injunction recites that the parties appeared and were heard. This is conclusive upon the matter; and consequently this petition comes too late.

AMES, C. J. The substance of this case seems to be, that the petitioner, having obtained the state process for the collection of his debt, has, together with the officer to whom he delivered it, abused the process by levying it upon property other than that of the defendant in execution, to the disturbance and embarrassment of an express trust; and the trustee, having sought and obtained against such abuse an injunction from this court,—the only tribunal competent to grant it,—the petitioner now seeks to remove the suit in which the injunction is granted to a tribunal, which, by the law which limits its jurisdiction, cannot enjoin his process, so that he may wield it without any equitable control whatsoever. In other words, he seeks our jurisdiction to obtain an execution, and having obtained it, would fly to another to avoid all control against his abuse of it. The suggestion that the court of common pleas, out of which the execution issued, can exercise such control, has no foundation; for, although a court of law may revoke an execution unadvisedly issued, it has no power to prevent the improper use of it by the party to whom it has been properly granted.

There is much reason, therefore, in the objection of the respondent, that the petitioner, a citizen of Massachusetts, having applied for and obtained the state process, has thereby so far submitted himself to the state jurisdiction, that he cannot by removing an injunction bill made necessary by his abuse of that process, evade that healthful, equitable, control, which can only be had in the state courts; but that such bill is, for the purposes of jurisdiction, to be deemed ancillary, and not original, within the spirit of *Dunn et al. v. Clarke et al.* 8 Peters, 1.

But however this may be, the fact, that Potter, the co-defendant of the petitioner, is a citizen of Rhode Island, is fatal to this petition for removal. He is no formal or unnecessary party, as has been suggested, whose presence a court can disregard in considering this question of jurisdiction; but one, within the criterion recognized in the case of *James & wife v. Thurston*,

Gardner & Co., supra, 428, against whom a decree is asked, and must be had, in order to the direct and effectual relief by injunction, to which the plaintiff, as trustee, is entitled. Neither is he an official party merely, within the line of cases relied on, who represents, by virtue of some special law, the interests of aliens and citizens of other states. He is not pursued in his official, but in his personal character, as one about to commit a wrong under the false pretence of official action. In his official character a court of equity has no control over him whatsoever; but, notwithstanding that character, if he assumes a power over property which the law does not give him, considers him as no longer acting under the authority of his commission, and treats him as a person, merely, dealing with property without any authority whatsoever. *Greene v. Mumford*, 5 R. I. Rep. 475, and cases cited. In this it does not differ from a court of law, which regards a sheriff, who, upon an execution against A. seizes the goods of B., as a mere trespasser, to be personally and not officially pursued for his trespass.

In this view it becomes unnecessary to decide upon any other objection which has been made to the removal of this suit, and this petition must be dismissed, with costs.

ALDEN A. BATTEY v. NEHEMIAH S. HOPKINS.

Where one who held the legal title to a farm, with a resulting trust to his daughter, with whose money it had been purchased, at her request conveyed the same to a third person, on condition that "she should provide a good and sufficient home and living" for the daughter "during her natural life," but if the daughter should see fit to marry, then the farm conveyed should "revert back" to the daughter, her heirs, &c. after marriage, provided she or they should reimburse the grantee for all the expenses of living up to the time of marriage, and for all the improvements, if any, made upon the farm, *Held*: the daughter having married and reimbursed the grantee according to the condition of the deed, that she became thereby immediately clothed with the legal title to the farm; the clause of the deed in her favor being construed to operate by way of a conditional limitation.

TRESPASS and ejectment to recover possession of a farm in Scituate.

Battey v. Hopkins.

The case was submitted to the court, under the general issue, in law and fact, and was as follows:— The plaintiff claimed title to the farm, mediately, under Josiah W. Battey, and that the said Josiah was entitled to the same as heir at law of his daughter, Mary E. Chaping, afterwards, by marriage, Mary E. Steer, who died without issue, before her said father. The defendant claimed under a deed from Elizabeth Hopkins; and the question between the parties arose out of the provisions of a deed executed by the said Josiah W. Battey to the said Elizabeth Hopkins, in August, 1849. This deed, which conveyed the farm in contest to Elizabeth Hopkins in consideration of the sum of five hundred dollars, contained the following condition:—

“ The condition of this deed is as follows:— Whereas my daughter, Mary E. Chaping, having furnished the aforesaid sum of five hundred dollars in purchasing the aforementioned farm of Jonah Titus, and also being in ill health, at the request of my said daughter, Mary E., I have given the aforesaid deed, and upon the following contract entered into by the said Mary E. and Elizabeth Hopkins, wife of Duty Hopkins, of Scituate, to wit: the said Elizabeth Hopkins, her heirs, executors, administrators or assigns, shall furnish and provide a good and sufficient home and living for the said Mary E. during her natural life. But if the said Mary E. should see fit to marry previous to the end of her said natural life, then the aforesaid property above deeded shall revert back to the said Mary E. or her heirs, executors, administrators or assigns, after marriage; provided she the said Mary E., or her assigns, shall pay or cause to be paid all the expenses she may have been to, in living, up to the time of said marriage, and also by paying for the improvements, if any, which shall have been made upon said land. I, the said Josiah W. Battey, do hereby retain the privileges of water running across said land, deeded as above.”

It was proved, that in November, 1850, Mary E. Chaping intermarried with Curles Steer, of Scituate, and shortly after, in the December of the same year, died intestate, and without issue, leaving her father, the said Josiah W. Battey, her sole heir at law. Evidence was submitted, on both sides, upon the ques-

tion of fact, whether Mary E. Chaping had reimbursed Elizabeth Hopkins for her expenditures, according to condition of the deed, so as to entitle her again to the estate, the result of which is stated in the opinion of the court.

Thurston and Ripley, for the plaintiff.

G. M. Sayles and Metcalf, for the defendant.

BOSWORTH, J. The clear intent of the parties to the deed from Josiah W. Battey to Elizabeth Hopkins ought to be carried out, if it can be consistently with the rules of law. From the recitals in the deed it appears, that the legal title to the land at the time of the grant was in the grantor, while the equitable ownership or title was in Mary E. Chaping, his daughter. The conveyance was made at the request of the equitable owner, in pursuance of an agreement between her and the grantee, by which it was understood that the grantee, her heirs, and assigns, should, in consideration of the conveyance, furnish to the said Mary E. Chaping a good home and living during her natural life; but if the said Mary E. should see fit to marry, the property should *revert* to her, her heirs, and assigns, she or they paying the expenses of living up to the time of marriage, and for all improvements that might be made on the land. The proof made in the case satisfies the court, that the said Mary E. Chaping was lawfully married in her lifetime, and that full satisfaction was made to the grantee in the deed for all expenses of the living by her furnished to the said Mary E. Chaping, and that the grantee has made no improvements on the land.

It would seem, therefore, that in equity the title to the land ought to have vested in Mary E. Chaping upon the event contemplated in the deed, — viz.: her marriage. Is there anything in the rules of law to prevent this title from vesting in her? The grantee, Elizabeth Hopkins, if she still holds this title, has it without consideration; all that she has expended in pursuance of the contract under which she took the deed having been reimbursed to her, according to the proof. It is objected that the rule of law is, that the benefit of a condition can only be reserved to a donor and his heirs, not to a stranger; and that the term, *revert*, in its strict, literal meaning, implies a *return* of

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the estate, which, of course, could only be to the donor from whence it came. But words are to be construed in the sense in which they are used, if that sense can be clearly ascertained. The grantor of this deed had, according to its recitals, nothing but the bare legal title to the estate granted; the real title being in Mary E. Chaping. He wished to comply with the desire of his daughter, which is patent in the whole transaction, viz.: to provide, with her own property, a living for his daughter for her life, if she remained single, and at the same time to provide that in the event of her marriage she should, upon payment of what her living should cost up to that time, have her land again. This would be the reversion of the property which she had when the deed was executed; and the expression, "revert," was a natural, though perhaps not a very artistical use of the word, and was intended to operate as a conveyance over to her, by which, in addition to the equitable title which she had in the beginning, she would, upon the contemplated contingency, be invested with the legal title to the land. The true effect of this deed was therefore, as we think, to convey to Elizabeth Hopkins an estate on condition, with a gift over upon a contingency, which is in law a conditional limitation. Such a limitation over gives to the person claiming under it, whether heir or stranger, an immediate right to the estate. See Cruise's Dig. vol. 2, p. 282, and cases there cited. We think, therefore, that the legal title to this estate concurs with the clear equity of the case, and was vested in Mary E. Chaping after her marriage; and judgment must be rendered for the plaintiff, who derives his title from her.

CURTIS NOBLE v. WILLIAM H. SMITH.

An assignment in trust for the benefit of creditors, made in New York between citizens thereof, is held in that state to transfer to the assignee a debt due to the assignor in another state, without notice of the assignment to the debtor, provided the debtor be not prejudiced by want of notice; and hence, such an assignment, when prior in time to an attachment by foreign process of the assigned debt here, will defeat the attachment,

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especially when made by a citizen of New York, though the debtor had no notice of the assignment at the time he was served, provided, always, that he be not prejudiced by the want of notice.

THE writ in this case was served by foreign attachment upon the firm of E. M. Aldrich & Co., of Providence, for the purpose of attaching in their hands a balance of account due from them to the defendant for goods sold by them for him on consignment.

From their affidavit and an agreed statement of facts filed in the case, it appeared, that on the day when the writ against Smith was served upon them, to wit: on the 7th day of February, 1860, there was a balance in their hands to his credit, growing out of a consignment, of \$91.75; but that on or about the 3d day of March, 1860, they received written notice from John Dearborn, dated March 1, 1860, that Smith, who as well as the plaintiff, resided in New York, had made to Dearborn in New York an assignment in trust for the benefit of his creditors, and requesting them to remit to said Dearborn, as assignee, the balance aforesaid. It further appeared, that on the 1st day of February, 1860, the defendant Smith had executed to said Dearborn such an assignment, which embraced the demand or balance of account in question. The question was, whether upon these facts the garnishees were charged by the attachment?

Browne & Van Slyck, for the plaintiff.

Miner, for the defendant, cited *Bohlen v. Cleaveland et al.* 5 Mason, 174; *Beckwith v. Union Bank*, 5 Selden, 211.

BRAYTON, J. The question to be determined in this case is, whether the service of the writ upon the garnishees, E. M. Aldrich & Co., operated to attach the debt originally due from them to Smith, the defendant, or, whether the assignment executed by Smith to Dearborn on the 1st day of February, 1860, operated to transfer the debt to Dearborn before, and without notice to the debtors, Aldrich & Co? Were Aldrich & Co. at the time of the service of this writ, in contemplation of law, the debtors of Smith, or did they, upon the execution of that assignment, become the debtors of Dearborn the assignee? If the first, the attachment must be held good; if the last, then the garnishees must be discharged, as having nothing in their hands belonging to the defendant.

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In some of the states this attachment would be held good, on the ground that in order to perfect the transfer by the assignment, it is necessary to give notice to the debtor, or otherwise that the incumbrancer or attaching creditor should have notice of the assignment. This is the English rule, as it is that of Connecticut and of Vermont. *Van Buskirk v. Hartford Ins. Cor.* 14 Conn. 141; *Loomis, d. Jackson v. Loomis*, 26 Verm. 198; 18 Ib. 42; 25 Ib. 242; *Stocks v. Dobson*, 15 Eng. L. & Eq. 314; S. C. 19 E. L. & Eq. 96; *Meux v. Bell*, 1 Hare, 73; *Foster v. Blackstone*, 1 My. & K. 297; 9 Bligh. 332. And it is held that though no delivery can be given of the subject of the assignment, it is the duty of the assignee to perfect his transfer as against creditors and purchasers, as far as is in his power, and shall there do what the courts hold to be equivalent, viz: give notice to the debtor of his right under the assignment; and this notice in fact to the debtor is held to be constructive notice to both creditors and purchasers. This, however, is not the universal rule; but in some states it is held, that the transfer is complete upon the execution of the assignment, and that the subject of the assignment passes immediately, and without notice; and because, as the courts say, no delivery can be made, nothing more is necessary to complete the title. This seems to be the rule in Massachusetts, and in some other of the states. *Blake v. Williams, & Marshall, trustee*, 6 Pick. 286. It is held that notice is only necessary to protect the debtor, lest he should pay over to the original creditor without notice. *Warren v. Copelin*, 4 Metc. 394. It seems to be sufficient, that the debtor has notice at any time before he pays over, or by his dealing with the creditor becomes released in whole or in part; and in case of attachment of the debt in his hands, that he has such notice of the assignment that he can disclose it in his answer in the suit, and avoid being charged. *Warren v. Copelin*, 4 Metc. 394.

So, also, is the rule in New York, as to the necessity of notice to the debtor in order to perfect the transfer. *Beckwith v. Union Bank*, 5 Selden, 211. In that case the court held that no notice was necessary to be given to the bank, in order to perfect the transfer of the amount deposited to the credit of the

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assignor, but that without notice, the bank might have so dealt with the assignor as to affect the rights of the assignee. If by the laches of the assignee in leaving the debtor in ignorance of his claim, the debtor so deals with the original creditor as if he were still his creditor, and thereby becomes prejudiced, it shall be the loss of the assignee, and not of the debtor. The notice, however, is only necessary for the protection of the debtor himself. See also *Holmes & others v. Remsen & others*, 4 Johns. Ch. 420.

The statement of facts shows that the assignor, at the time of the assignment, was resident in the State of New York, as was the assignee and the plaintiff in the suit. The trust of the assignment was to be executed in New York.

The law of the owner's domicile must determine the validity of the transfer or alienation, unless there be some positive or customary law to the contrary where the property is to be found. *Black & Chapman v. Zacharie & Co.* 3 How. 483; *Warren v. Copelin*, 4 Metc. 494; *Story's Confl. of Laws*, §§ 383-4; 4 Johns. Ch. 420. It does not appear that the garnishee in this case has, for want of notice, become in any way prejudiced, so that the assignment should not be allowed to operate and to transfer the debt in his hands to the assignee. The garnishees must be discharged.

JOHN B. FARRINGTON, Surviving Partner, v. JOHN A. ALLEN & others.

Where a debtor was on the same day committed to jail upon two executions at the suit of the same creditor, upon each of which commitments he executed a bond with sureties for the liberty of the prison-yard, and within thirty days of his said commitments executed to the jailer but one assignment for the benefit of his creditors, *Held*: that he had complied literally, as well as substantially, with the requirement of sect. 4, ch. 197, of the Revised Statutes; and, although he did not return to close jail within said thirty days, had committed no escape upon either of his said bonds.

MOTION for a new trial, on the ground that the judge presiding at the trial misdirected the jury in the matter of law.

The action was debt, for an escape upon a bond for the liberty of the jail-yard in the county of Providence, in which the issue in substance made by the pleadings was, whether the principal defendant, John A. Allen, had, according to the requirement of ch. 197, sec. 4, of the Revised Statutes, and the condition of his bond, made an assignment of all his property for the benefit of his creditors, within thirty days of his commitment; he not having returned to close jail, within that time. At the trial before the chief justice, with a jury, at the present term of this court, it appeared, that on the 11th day of December, 1858, Allen was committed to jail on an execution in favor of Smedes & Farrington, of which firm the plaintiff is surviving partner, and gave the bond for the limits of the prison-yard, upon which this action is brought. On the same day, Allen had just before been committed to the same jail on another execution in favor of said Smedes & Farrington, for which he had also given bond to the jailer for the liberty of the prison-yard. It also appeared, that within thirty days from said 11th day of December, 1858, said Allen had made only one assignment to the jailer, in the form required by ch. 197 of the Revised Statutes. The counsel for the plaintiff thereupon requested the court to charge the jury, that the assignment of John A. Allen as aforesaid could apply only to the first commitment of said Allen, made within thirty days of said assignment, and not to any other commitment made within said thirty days, and subsequent to said first commitment. But the court refused so to instruct the jury, but did instruct them, that if they found that said Allen did, within thirty days from the 11th day of December, 1858, make an assignment of all his estate of every kind, not exempt from attachment by law, and wherever the same might be, to the keeper of the jail and his successor in office, his heirs, and assigns, in trust, for the equal benefit of all said Allen's creditors in proportion to their demands, this was a fulfilment of the condition of the bond sued. Under this instruction the jury having returned a verdict in favor of the defendants, the plaintiff now moved for a new trial, upon the ground, that the jury had in this respect been misinstructed in matter of law.

Farrington v. Allen & others.

Ballou & Brownell, for the plaintiff.

Thurston & Ripley, for the defendants.

BOSWORTH, J. Persons imprisoned for want of bail in civil actions, or on execution in any civil action, (with exceptions provided by statute,) may have the liberty of the jail-yard, upon giving bond with sureties, as provided by the 2d sect. of chap. 197 of the Revised Statutes. By sect. 4 of the same chapter it is provided, that no person committed on execution shall have this privilege for more than thirty days, unless he shall, within that time, make an assignment to the jailer of all his property, for the equal benefit of his creditors.

In this case, the defendant Allen was committed on two executions in favor of the plaintiff. In each case he gave bond for the liberty of the jail-yard; and within thirty days executed an assignment to the jailer according to the requirements of the statute. Having given bond on each execution, and having made one assignment within thirty days from commitment on both executions, he keeps the liberty of the jail-yard; and the plaintiff now sues on one of the bonds as for an escape. The plaintiff contends, that this is an escape as defined by the sixth section of the act contained in chap. 107 of the Revised Statutes. The judge, at the trial, ruled otherwise; and for this alleged error of ruling, the plaintiff asks for a new trial.

The provision of the 6th section is, that if the person committed on execution shall neglect to render himself to the keeper of the jail within thirty days, or make an assignment as before provided, he shall be deemed to have committed an escape under his bond for the liberty of the jail-yard.

The defendant has literally complied with the terms of the statute. On whichever of these bonds he may be sued, he may truly reply, that he has made an assignment within thirty days from his commitment; and this is all that the statute, by its terms, requires of him. If he had made two assignments at the same time, which is all that the plaintiff contends that he should have done, he would have done no more. By one assignment he conveys all the property which he has, and by two he could convey no more. He has, therefore, complied, as it seems to us, with the spirit of the law as well as with the letter

of it. Under the circumstances of this case, the ruling of the court at the trial was most exactly in accordance with the law, regarding both its substantial requirements and its strict literal construction.

But it was argued at the bar, that the peculiar circumstances of this case could not exempt it from the rule required by the general policy of the law; and that the policy of the law required that an assignment should be made with reference to each execution on which the debtor is committed. A subsequent section of the statute provides, that the jailer may, on request of the creditor in execution, assign or transfer the assignment to such creditor, and thus exempt himself from liability for any property of the debtor other than that which he actually receives. The plaintiff in this case, treating this provision as giving a right to the creditor to have the assignment on request, argues, that the policy of the law requires that there must be an assignment with reference to each execution, because, if there are several creditors in execution, each creditor has a right to a transfer of the assignment from the jailer. A sufficient answer to this argument would be, that the transfer of the assignment is not made the right of the creditor, but is, on request made by him, at the option of the jailer, to whom the assignment in the first instance is made. If the jailer receives the assignment and transfers it to one creditor, of course he cannot also transfer the same assignment to another; and if he had two assignments executed to him by the same debtor, as the plaintiff contends he should have if the debtor is committed on two executions, a conveyance to the same creditor of both assignments would be a mere form as to one assignment; and if made to different creditors in execution, would either be an empty form as to one assignment, or would create rival claims to the same property under the two assignments.

The literal interpretation of the statute is, therefore, the sensible one. Having made an assignment within thirty days from the time of his commitment on both executions, the debtor is not liable on either bond as for an escape.

The petition for new trial must be refused, with costs.

Kendall & others v. Winsor.

GEORGE KENDALL & others v. JOSEPH WINSOR.

6	453
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11	92

A state court has no power to enjoin proceedings in a court of the United States; especially in a suit at law for damages for the infringement of a patent, so expressly, if not exclusively, confided by law to the federal courts.

If it had such power, it would be no ground for equitable interference, when the defences relied upon in equity are equally available at law, that parties, who were not at the time of trial examinable as witnesses, have since been made so, in the state courts, by statute.

A circuit court of the United States has, irrespective of the citizenship of the parties, power to entertain a bill for discovery in aid of the defences to a suit for the infringement of a patent, as ancillary to such suit, if not by the express authority of the 17th section of the act of congress, passed July 4, 1836, entitled "An act to promote the useful arts, &c."

BILL IN EQUITY to enjoin the execution of a judgment for damages, recovered by the respondent against the complainants in the circuit court of the United States for the Rhode Island district, in a suit at law for the infringement of a patent.

The bill alleged, that the complainant, George Kendall, purchased of one Kendall Aldrich his inchoate right to letters-patent of the United States, as an inventor of a machine for making weavers' harnesses, and took an assignment from said Aldrich, in writing, of said right; that thereupon the complainant, Kendall, took said Aldrich into his employment for the purpose of perfecting and constructing said machines, and, in connection with the other complainants, Leander M. Ware and George L. Jenckes, commenced to construct said machines upon the model of said Aldrich's machine, of which said Aldrich represented that he was the sole, original, and first inventor, and had worked said machines for about a year before they heard or knew that any other person than said Aldrich did or could claim that he was the first or original inventor thereof; that subsequently, to wit, in the summer of 1854, after the complainants had completed said machines, and had commenced making harnesses upon the same, they learned that the defendant claimed to be the first and original inventor of said machine;—that said Aldrich had been in the employment of the defendant, before making sale of his patent-right to the complainant, Kendall;

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and that the defendant had commenced making harnesses on his machine previous to 1849, and had continued to make and sell such harnesses from that year until the year 1854; that the complainants had no knowledge of the defendant's machines, nor how the same were constructed and operated; and relying upon the representations of said Aldrich, believed and acted upon the belief, that the machines they were constructing were substantially different from those operated by the defendant; that the defendant knew that the complainants were constructing said machines as early as May or June, 1854, and told the complainant, Ware, that he had such knowledge; and upon said Ware's inquiring about the defendant's machines, also told him, at several times during the summer and fall of 1854, that he did not intend to take out a patent for his machine, — that a patent was no protection, and that he would not and should not take a patent therefor, but should rely wholly upon the protection of his locks and bolts, and the secrecy with which he kept the machine and the complex character of its construction; that said defendant also called at the place of business of the complainant Kendall some time in August, 1854, after all the machines constructed by the complainants were finished and in operation, and proposed to him to unite their several interests in a joint-stock company, and work their machines in common, for the equal benefit of both; that the defendant, at various times from the year 1846 to the autumn of 1854, stated to many persons who inquired of him concerning his said machines, and who advised him to get a patent for the same, that he did not intend to take out letters-patent for the same, but should trust to his locks and bolts, and to the secrecy with which he kept his machine, and to the complex character and difficulty of imitating it, rather than to the protection of letters-patent, which must be made known to the public; that such representations and conduct on the part of the defendant induced the complainants to believe that he did not intend to take out letters-patent for his machine, and they completed and put in operation their said machines under the belief, induced by the defendant, that they might construct and operate such machines if they could; and that if the defendant had notified

them of his claim, as the first and original inventor of said machines, at the time when he first knew that the complainants were constructing them, and of his intention to take out letters-patent therefor, they would have desisted from completing said machines, except by the license and permission of the defendant; that said defendant, by his said declarations and conduct to the complainants, and by his declarations to others who communicated the same to the complainants, induced and permitted them to incur a heavy expense in completing said machines, and in preparing to carry on the manufacture of weaver's harnesses thereby, and licensed the complainants to operate said machinery so constructed by them and to use his inventions therein, notwithstanding any subsequent letters-patent which might be taken out by him; that the defendant, after his said acts and declarations and after all the machines of the complainants were, to the knowledge of the defendant, constructed and put in operation, on or about the fourth day of November, 1854, made application to the patent-office of the United States for letters-patent for his said invention, which in due course were issued to him on the second day of January, 1855; that on the eleventh day of September, 1855, the defendant commenced a suit against the complainants in the circuit court of the United States for the district of Rhode Island, for an infringement of his said letters-patent by the use of the machines so constructed and operated by them as aforesaid; and such proceedings were had in said case, that at a trial thereof at the November term of said court, 1856, the said defendant recovered a verdict against them for the sum of two thousand dollars and costs; that exceptions having been taken by the complainants to the rulings of the judge who tried the cause, a writ of error was allowed, and said writ and exceptions were argued at the term of the supreme court of the United States, held on the first Monday in December, 1858, and the decision of the circuit court approved; and that by mandate of said supreme court, final judgment in said suit has been entered up in said circuit court against the complainants, and execution has been taken out thereon, and is now in the hands of the defendant or of his attorney for service; that at the trial of said cause the

complainants were prevented from showing the facts and the license herein set forth, inasmuch as all the conversations between them, or either of them, and the defendant, were had with the defendant alone, and not in the presence of any other person, and by the law as it then stood, the complainants could not, in a trial at common law in said court, call the defendant as a witness, nor offer themselves as witnesses, and they could not file a bill of discovery in said court to procure the admissions of the defendant, inasmuch as said court had no jurisdiction over said parties for the purposes of said bill; that although some evidence of the declarations and conduct of the defendant were offered to the jury, the complainants were not able, for the reasons aforesaid, to prove the facts and declarations and license herein set forth, and could only offer the declarations of the defendant made to others who were not connected or intimate with the complainants, and who were not engaged in constructing said machines; that the defendant, by his declarations and conduct with regard to the complainants and the machines built by them prior to the defendant's application for letters-patent is, and ought to be, estopped from enforcing said judgment against them, and that it would be contrary to equity and justice for him so to do.

The bill then went on to interrogate the defendant particularly with regard to his interviews with, and declarations to, the complainants, or either of them, amounting, as alleged on the bill, to a license to use his invention and estopping him from enforcing his said judgment, and concluded with a prayer, that the defendant might be declared to be estopped by his conduct and declarations to the complainants and others, from revoking the license and permission given by him to the complainants to operate the machines so constructed by them prior to his application for letters-patent, and that the defendant might be perpetually enjoined from enforcing his said judgment, and from making service of his said execution on the complainants, and for general relief.

The defendant demurred to so much of this bill as sought relief on the grounds that at the time of the trial at law mentioned therein, the complainants, under the then state

of the law, could not, in a trial at common law in the circuit court, call the defendant as a witness, nor offer themselves as witnesses, and could not file a bill of discovery in said court to procure the admissions of the defendant. In addition, he filed an answer to the bill, disclaiming all knowledge of the complainant's, Kendall's, purchase of Aldrich's right to letters-patent for an improvement in machines for making weavers' harnesses, except as informed by the bill, and also all knowledge of Kendall's employment of Aldrich, and of the latter's commencement of the construction of machines, in connection with the other complainants, upon the principle claimed by him as his invention. The answer goes on to aver that as early as the defendant was informed that the complainants had surreptitiously obtained a knowledge of the principle and mode of operation of a machine for making weavers' harnesses, which was invented by the defendant, and which for a long time he had endeavored, with every precaution of secrecy, to perfect, in order that he might, with reasonable diligence, secure the benefit of it to himself under the protection of letters-patent; and expressly denies that he ever, directly or indirectly, by any act, statement, or language, conveyed the idea to the complainants, or to either of them, or to any other person, that he did not intend to secure the benefit of his invention by letters-patent, and to rely upon his bolts and locks, and upon the complex character of his machine, so as to induce the belief or opinion that he intended to abandon his invention, and his right, under the acts of congress, to secure the benefit of the same to himself, when, by sufficient experiment, he had rendered it useful and practicable. That in November, 1854, after a long course of experiment, extending over years, during which he met with repeated failures and disappointments, the defendant succeeded in perfecting his invention so far, that his application for letters-patent was filed in the patent-office, although, as early as February, 1853, he had taken steps to secure the invention, by placing the matter in the hands of his solicitor, and on the second day of January, 1855, letters-patent were issued to him. That at the November term of the circuit court of the United States for the district of Rhode Island, 1855, —

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a court having jurisdiction of the parties, and exclusive jurisdiction of the subject-matter,—the defendant commenced a suit at law against the complainants for an infringement by them of the letters-patent securing to him his said invention; and at the November term of said court, 1856, the case was fully tried upon the issue of abandonment on the part of the plaintiff to the action, of his said invention, and of the right of the complainants to use the specific machines built by them, as alleged, prior to the date of the defendant's application for letters-patent, and a verdict for damages for such infringement was rendered for this defendant; that a writ of error was sued out by said complainants, and the exceptions upon which the same was founded were argued at the December term of the supreme court of the United States, when the judgment of the circuit court was affirmed, and a mandate, in accordance with that affirmance, was transmitted to said court, and final judgment has been entered in favor of the defendant, as appears by a copy of the record in said court, and of all the proceedings in said cause, to the answer annexed, as a part thereof. The answer then denies all, and all manner of unlawful combination and conspiracy, concluding in the usual form.

The case was submitted to the court upon bill, answer, and demurrer; and upon the following briefs.

T. A. Jenckes, for the complainants.

The demurrer of the defendant is not well taken.

I. The ground for the discovery and relief prayed for, is not that there has been a change in the statute law of the state, by which parties can be witnesses in their own behalf, but because the facts stated in the bill disclose a clear case of license to the complainants from the defendant to operate the machines referred to, or an estoppel against him from setting up his patent obtained subsequent to the facts set forth, to the injury of the complainants in their use of said machines. The ground of relief being purely equitable, it was proper for the complainants to try their case at law, with such defences as they had to an action at law, before coming into a court of equity for relief. This they have done, and their legal defences have not availed them. The portions of the bill demurred to are statements by

way of excuse to show why the grounds of relief in the bill were not taken at law, in case the court should think that they would have been tenable at law. It has frequently been determined that a party shall not have relief in equity after a *full and fair trial* at law, although a court of equity may have jurisdiction. *Marine Ins. Co. v. Hodges*, 7 Cranch, 332; *Smith v. McIver*, 9 Wheaton, 532. The complainants were bound to allege, therefore, not only facts to show a case for equitable relief, but the reason why those facts were not submitted to the court of law. This they have done in the allegations referred to. They do not ask to have the defendant enjoined from using the process against them, issued by the United States court. This he has done, and is now pursuing them in this court upon a bond given to obtain their liberty from the commitment upon the process of that court. This court clearly has power to grant that relief.

II. The complainants did not have a full and fair trial at law. The statements in their bill show, that they did not have such full and fair trial, and those statements are to be taken as if proven upon this demurrer. They are,—

1. The matters in defence were within the knowledge of the plaintiff and defendant only, and of no other persons.

2. The complainants could not compel a discovery from the defendant, such as is now sought here, because the United States circuit court has no jurisdiction over the parties to compel a discovery.

3. The parties could not be witnesses in their own behalf, nor could the complainants compel the defendant to become a witness.

4. The complainants were not in fault in failing to present to the circuit court proofs which they had not the power to produce.

III. The relief prayed for in no way interferes with the process, proceedings, or judgment in the circuit court. Those proceedings have spent themselves; and the plaintiff in that court has resorted to this jurisdiction for relief, and himself and the subject-matter of his suit are now within the exclusive jurisdiction of this court.

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IV. Each case is to be tried under the law respecting the admissibility of testimony, as it exists at the time of trial. It was to the advantage of the defendant that the complainants could not be witnesses, and could not compel him to be a witness at the trial at law in the United States circuit court. It may not be to his advantage that all the parties are competent witnesses in this court. But all parties take the risk of statute changes in the law of evidence, as well as in other laws. The change may not be a sufficient ground for granting a new trial in a case at law; but it is a reasonable excuse in a court of equity for not having been able to present fully a defence in a case at law, in which a judgment has been rendered contrary to the equities between the parties. It is a sufficient ground of relief to allege, that the circumstances upon which the complainants' equities are founded, are peculiarly within the knowledge of the defendant, and that he could neither be compelled to testify, in the law court in which he sued the complainants, nor to answer a bill of discovery.

V. The interrogatories to the defendant do not call for evidence merely cumulative to that offered in the court at law. The allegation in the bill demurred to, which is the only place to which we can look for facts, states, that "although some evidence of the declarations and conduct of the defendant were offered to the jury, yet they (the complainants) were *not able* to prove the facts and declarations and license hereinbefore set forth for the reasons aforesaid," *i. e.* because "all the conversations between your orators or either of them and said defendant were with the defendant alone, and not in the presence of any other person." The declarations of the defendant to other persons tended to prove an abandonment of the invention to the public, as much or more than they tended to prove a license; and these declarations did not and could not refer to the conversations between the parties, and, under the language of the bill, cannot be so held to refer. The answers to the interrogatories in the bill do not therefore call for cumulative evidence.

VI. It is submitted that the case stated in the bill is clearly one for equitable relief, and that the demurrer admits directly the truth of the facts alleged, and impliedly admits that the discovery prayed for would sustain those allegations by the admis-

sions of the defendant. Upon the case as it stands, therefore, the complainants are entitled to relief against the judgment sought to be enforced against them. The cases cited by the defendants' counsel have no bearing upon the issues now presented. *Sawyer v. Merrill*, 10 Pick. 16, was a motion for a new trial, so that one person sued as a tortfeasor, who had been discharged by the verdict, might be a witness for another tortfeasor, charged by the verdict. The court say that the new trial, if granted, would include both, and therefore that there was no weight in the reason assigned. *Ableman v. Booth*, has no analogy to the case at bar. We must look to the bill for the facts in this case, and not to the report of *Winsor v. Kendall*, in the supreme court of the United States. It is submitted that the defendant should answer over.

Thurston and Ripley, for the defendant.

I. A change in the statute law of this state cannot be a ground for a new trial in actions previously disposed of, while the law was otherwise, and consequently this fact cannot furnish a basis for any equitable relief. The ground relied on in the bill substantially is, that witnesses who were incompetent to testify when the case was tried, have now become competent. *Sawyer v. Merrill*, 10 Pick. 16.

II. The effect of compelling the defendant to answer this part of the bill would be to imply, that if the fact was found against him at the final hearing, the judgment of the circuit court of the United States could be interfered with by this court. *Ableman v. Booth*, 21 Howard, 507.

III. Admitting that the parties complainant would testify, as is asserted to be the fact in the bill, the court can see that the evidence would be only cumulative. Evidence was offered on the same controverted points at the trial. See *Winsor v. Kendall*, 21 Howard, 322.

IV. It would be idle, therefore, to compel a discovery of that which, if true, could not affect the judgment already rendered.

V. It is no ground for relief that the complainants in this suit could not, on account of the citizenship of the parties, maintain a bill of discovery in aid of the case in the circuit court. The plaintiffs could have made themselves competent if they

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had desired; and even without this, on the authority of *Dunn v. Clark*, 8 Peters, 1, the court would entertain an ancillary bill, it being in fact a part only of the pending suit.

AMES, C. J. We have not the power, if we had the inclination, to enjoin proceedings in the courts of the United States; (*McKim v. Voorhies*, 7 Cranch, 279; 2 Story's Eq. Jurisp. § 900, and cases cited;) and should hardly think of commencing so novel an enterprise in a case for the infringement of a patent, which is expressly, if not exclusively, confided by law to those courts. 5 U. S. Statutes at Large, 124; 2 Kent's Com. 368, and cases cited. Nor does this bill by its allegations furnish us with the least excuse for such interference beyond our proper limits. It discloses no defence to the claim for damages in the suit at law, which was not equally available in that suit, as it would be in a court of equity, whether the defence be by way of license, or of estoppel, or because the machines of the defendants were constructed before the plaintiff's application for a patent. The suggestion in the bill, that when this case was tried in the circuit court of the United States for this district, parties were not allowed, as now in our state courts, to be called, or to offer themselves as witnesses, affords not the slightest ground for our interference. It would not, upon a bill for a new trial, had the trial at law been in our own courts; (*Briggs v. Smith and another*, 5 R. I. Rep. 213;) and certainly cannot excuse us for trespassing upon the settled jurisdiction of the courts of the United States. The plaintiffs are mistaken in supposing, that if they had applied in time, they might not have been assisted by the circuit court in their defences, by way of discovery. Irrespective of the citizenship of the parties, the court would have entertained, at the suit of either, a bill of discovery, as ancillary to the suit at law, under the authority of *Dunn v. Clark*, 8 Peters, 1; if indeed it would not have been empowered to do so by the express authority of the 14th section of the act of Congress, passed July 4, 1836, and entitled, "An act to promote the useful arts," &c. 5 U. S. Statutes at Large, 124.

In any view of this bill, whether we look at what it asks us to do, or the grounds which it lays for our action, it must be dismissed with costs.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

6 463
10 416
14 221
14 222

FOR THE
COUNTIES OF WASHINGTON, NEWPORT, AND KENT,
DURING THE FALL CIRCUIT, 1880.

PRESENT :

HON. SAMUEL AMES, CHIEF JUSTICE.
HON. GEORGE A. BRAYTON, } JUSTICES.
HON. ALFRED BOSWORTH, }

JOHN J. REYNOLDS v. THOMAS T. HOXSIE.

Prior to the enactment of the 12th section of ch. 195 of the Revised Statutes, an officer charged with an execution which he had levied upon real estate had an incidental power, for good cause, to adjourn from time to time the sale of the estate levied on, fixing the day of the adjourned sale at such time as he, under the circumstances, being responsible for a proper exercise of his discretion, thought fit, and giving reasonable notice of the adjourned day of sale in the manner provided by law for giving notice of the original sale; the section recognizing, but not conferring the power of adjournment, and its whole force being expended in its requiring, at least, one week's notice of the adjourned sale in manner aforesaid.

An execution sale of real estate which took place in 1855, before the enactment of said section, after being twice adjourned to enable mistakes in the newspaper advertisement to be corrected, was held valid.

EJECTMENT to recover an undivided ninth part of a tract of land in Richmond, Washington county, known as the Rey-

nolds Hoxsie farm. The case was submitted to the court in fact and law, under the general issue.

At the trial, it appeared that the plaintiff claimed title under a sheriff's deed to the interest of Reynolds Hoxsie, Jr., in the aforesaid tract possessed by the defendant, which interest was sold to the plaintiff on the 28th day of July, 1855, as the highest bidder therefor, at a sale under a levy thereon of an execution in favor of the plaintiff against the firm of Gardner & Hoxsie, of which the said Reynolds was a copartner. The officer's return upon the execution showed, that the levy was made on the 12th day of February, 1855, and that on the same day he posted up notices thereof, and that the interest attached would be sold on the premises on the 24th day of May, 1855, at 10 o'clock A. M., in three public places in Richmond; that at the above time and place of sale, he adjourned the sale to the 23d day of June, 1855, on the premises, and posted up in three public places in Richmond notices of the adjournment, and advertised the adjourned sale once a week, for three weeks, next before the time of the adjourned sale, in the "Westerly Echo," a newspaper printed in the town of Westerly, in the county of Washington; that on said 23d day of June, 1855, at half-past 10 o'clock, the officer charged with the execution adjourned the sale to take place on the premises on Saturday, July 28th, 1855, at 10 o'clock A. M., and posted up notices of the adjournment in the same three public places in Richmond as before, and advertised the sale for three weeks next before it in the "Narragansett Times," a public newspaper printed at Wakefield in the county of Washington, at which time and place he sold the interest in the property levied on to the plaintiff, as the highest bidder therefor, for the sum of \$200, and that on the 7th day of August, 1855, the plaintiff, upon payment of that sum, received from the sheriff the deed under which he claimed title. It was proved, that the reason for the first adjournment, — from May to June — was the discovery of a mistake in the advertisement of the sale in the newspaper, the day of the week named therein for the sale not corresponding with the day of the month named; and that the officer was afraid, on account of this mistake, to proceed with the sale, and with

Reynolds v. Hoxsie.

the consent of the plaintiff adjourned the sale until June 23d. It was also proved as the reason of the second adjournment, — from June to July, — when the sale took place, that there was a misstatement in the newspaper advertisement of the sale of the day of the levy; the levy being stated therein to have been made on the 12th day of *January*, 1855, when in fact it was made on the 12th day of *February*, 1855, and that on this account the sale was adjourned a second time with the plaintiff's consent.

R. W. Greene, for the defendant.

The officer had no power to adjourn the sale. Ch. 195, sect. 12, Rev. Stats. is an enabling act upon this subject, and confines the sheriff's power to adjourn to occasions of accidents, and extraordinary storms and tempests.

The first advertisement was void, the date being impossible. There was no legal sale to adjourn, and the sheriff should have started *de novo*.

This was not an adjournment for want of bidders; but even in such a case, the sheriff should return his process to the court issuing it, and ask that a new one should issue. The statute requires the notifications to be posted up three months; and these set forth the day of sale proposed. The notifications naming the times to which the sale was postponed, were posted up only a month each. Any change in the notification should be published by posting, as long as the statute requires the original notification to be posted.

Dixon, for the plaintiff, in reply.

The practice in this state has always been for sheriffs to adjourn sales upon execution, and for less than three months; and to hold the contrary would unsettle numerous titles by execution supposed to be good. The whole purpose of ch. 195, sect. 12, Rev. Stats. was, not to enable the sheriff to adjourn an execution sale, which he could do before, but to enable the sheriff to adjourn, for the reasons named in the section, upon giving one week's notice of the adjourned sale, instead of three weeks notice, before required.

The notification of the levy and of the proposed sale, to give the owner of the estate levied on an opportunity to redeem, is

a distinct thing from the advertisement of sale, and must be posted up three months; whereas the advertisement of sale, as the statute expressly directs, need only be once a week, for three weeks.

AMES, C. J. At the common law, a sheriff charged with a *fi. fa.* was obliged to proceed at once to seize and sell the goods of the execution debtor, having full power over the time, place, and mode of sale, in order to enable him to obey the exigency of his writ. He was not bound to sell at auction; but on the contrary, if he sold in this mode, could not charge against the goods levied the expenses of that mode of sale. If either party to the execution wanted the goods sold at auction, the party requesting it was bound to pay the expenses of sale out of his own pocket. *Woodgate v. Knatchbull*, 2 T. R. 148, 156, 157. The officer was not to consider whether it would be of advantage to the debtor to delay the sale or not, his duty being to sell immediately; and if the court found him colluding with the debtor for the purpose of delay, they would fix upon him the whole debt and costs, upon attachment. *Ib.* 157. If he could not find purchasers for the goods levied, or for enough of them to satisfy the debt and costs, his duty was to return the fact upon his process; and if a *venditioni exponas* was issued to him, he might make the same return to that; since, if the plaintiff in execution was dissatisfied with the return, he might set up a purchaser of the goods himself. *Leader v. Danvers*, 1 B. & P. 359, 360. If the goods were sold at auction, it was his duty, however, not to allow them to be sacrificed for want of bidders; and if a small sum in comparison with their value was bid for them, he was to keep them, and return that he did so for want of buyers, and wait for a *venditioni exponas*, which, in such a case, was construed to mean: "Sell for the best price you can obtain." Per Lord Ellenborough; *Keightley v. Birch*, 3 Campb. 521, 523, 524.

In this state, the sale of goods upon execution is regulated by statute, with more attention to the interests of the execution debtor. The sheriff is to sell the goods at auction, and not until he has advertised them for sale at least ten days, in order that the debtor may have that time in which to redeem them,

as well as to ensure them against sacrifice. With regard to real estate, which may be levied upon and sold here on execution, the statute still more carefully guards the rights of the debtor, requiring the officer to "set up notifications of said levy in three or more public places in the town where said real estate lies, for the space of three months before the same shall be exposed to sale, notifying all persons concerned, of the levy and intended sale of the estate, that the owner thereof may have an opportunity to redeem the same;" and also to "notify said sale, by causing an advertisement thereof to be published once a week, for the space of three weeks next before the time of sale, in some newspaper in the county where said estate lies; and if no newspaper be printed therein, then in some newspaper printed in Newport or Providence." Rev. Stats. ch. 195, sects. 8, 11.

The principal purpose of the notifications required to be posted up of the levy and intended sale, both of goods and real estate, is thus declared to be, in substance, with regard to the former, and in words, with regard to the latter, "that the owner thereof may have an opportunity of redeeming the same." Incidentally, however, the notifications served to give notice of the time and place of sale; and with regard to real estate, until the October session of the General Assembly, 1835, were, and with regard to personal estate now are, the only mode of advertising the time and place of sale, positively required by statute. Under these statutes, the practice has been for officers charged with executions, for good cause, to adjourn sales of property real or personal levied upon by them, duly advertising the change of the time of sale, that there may not be a failure for want of buyers. Such power of adjournment was always deemed incidental to the power to sell; the whole of which was intrusted by the execution, under the law, to the officer. No other order was ever issued to him than the execution; a *venditioni exponas* being wholly unknown in the simplicity of our practice. (Within the limits of the law, the officer exercised his discretion with regard to the time of sale; and as no positive publication of the necessary power of adjournment existed upon the statute book, adjourned the sale, from time to time,

as the exigencies of the case required. If he could not, from storms or accidents, reach the place of sale; if reaching it, from want of buyers, he could not sell, or could not sell except at a great sacrifice; in fine, if from any cause, consistently with the performance of his general duty under the execution, the sale could not take place at the time originally appointed, he appointed another time at which it might. Nor was this practice peculiar to ourselves; but in other states this same incidental power was not only possessed, but in proper cases required to be exercised, by sheriffs charged with sales upon execution, as a part of their duty. *Warren v. Leland*, 9 Mass. 265, 266; *Tinkom v. Purdy*, 5 Johns. 345; *McDonald v. Neilson*, 2 Cow. 159, 170, 185, 190, 191; *Russell v. Richards*, 11 Maine, 371; *Lantz v. Worthington*, 4 Barr, 153; *Richards et al. v. Holmes et al.* 18 How. 147. No doubt, officers were liable to either party to the execution, for the improper, and especially fraudulent exercise of this power, to his detriment; but that they were deemed to possess and actually did exercise it, long before our statutes incidentally recognized it as possessed by them, is perfectly notorious.

We do not by this intend to sanction needless adjournments of such sales merely for the purpose of delay, and especially not adjournments made by an officer in collusion with either party, to serve the particular interest of that party, to the injury of the other. When such cases arise, they will be dealt with according to their circumstances; it being perfectly understood that there cannot be a wrong, under our jurisprudence, for which the law in some form does not provide an adequate remedy. In the case at bar, there was not only no collusion of the kind adverted to, but the delay of sale caused by the adjournments was either absolutely required, or, in proper caution, prudent, in order to its validity. Accidentally, — and the evidence does not disclose whether by the carelessness of the officer or of the printer, — the newspaper advertisements of the sale, in both instances, embodied a mistake. In the first, the day of the week for the sale, appropriate to the day of the month named, was mistaken; and in the last, the levy was stated to have been made in January, when it was actually made in February.

For the purpose of correcting such mistakes, it was, in our judgment, quite proper for the officer, that the sale might be correctly advertised and all question of its validity upon this ground avoided, to adjourn the sale, as he did, for the periods necessary for this purpose ; and the defendant, at least, whose time to redeem was thereby enlarged, is the last person who has cause to complain of the delay.

Prior to the Revised Statutes of 1857, when the 12th section of chapter 195 was incorporated into our statute law with regard to the service of executions, the usual period of adjournment was from a week to three or four weeks, according to circumstances ; but, without the consent of parties, not in general longer ; since the command in the execution exacted of the officer reasonable diligence in making the money upon it. This section did not confer, but only recognized the well-known incidental power of the sheriff, for good cause to adjourn an execution sale ; and its whole force is, in our judgment, expended, by requiring of him to give at least one week's notice thereof in manner provided by law for notice of the original sale. It can have no application to the execution sale in question, which took place in 1855, long before its enactment. We deem this sale good under the law as it then stood, and there is no need of invoking aid from this recent addition to our statutes.

Let judgment be entered for the plaintiff, and execution for possession of the premises demanded issue in accordance therewith.

Woodman, Collector, v. The American Print Works.

COUNTY OF NEWPORT, AUGUST TERM, 1860.

JOB W. WOODMAN, Collector, v. THE AMERICAN PRINT WORKS.

A Massachusetts manufacturing corporation, which has hired by lease-parol print works in this state, is not taxable in the town where the works are situated for its cotton cloth there in process of being printed and prepared for market; such cloth not being "merchandise" or "stock in trade" in the sense of section 18, chapter 38 of the Revised Statutes.

THIS was an action on the case, brought by the plaintiff as collector of taxes in the town of Fall River, Rhode Island, to recover a town tax assessed against the defendants, a Massachusetts manufacturing corporation, who, in the year 1858, were lessees by parol of the Bay State Print Works, a calico printing establishment in said town.

The case was submitted to the court, under the general issue, both in fact and law; and it appeared, that on the 7th day of April, 1858, the town voted "that a tax of \$6400 be assessed upon, and levied and collected from, the ratable real and personal estates in this town for the purposes, to wit," &c.; and "that the taxes be paid into the treasury on or before the first day of September next." On the 10th day of May, 1858, notice was issued by the assessors to the owners of ratable property, to bring in their lists of such property, on the 17th, 24th, or 31st days of that month. The valuation was completed on the 31st day of May, and the tax assessed on the 1st day of June, 1858; the proportion of the defendants being fixed by the assessors at the sum of \$572.50, to recover which this action was brought. At the time the tax was ordered by the town, to wit: on the 7th day of April, 1858, the defendants had no taxable property in Fall River, R. I. Subsequently, however, they hired the Bay State Print Works in that town; and on the 17th day of May, 1858, had at those works, in the shape of unbleached goods and goods in the process of printing, which

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were to be printed and packed there and then brought into Massachusetts to be shipped for market, personal property to the amount of \$5000; and on the 17th and 31st days of May such property to the amount of about \$30,000.

Sheffield, for the plaintiff.

By the policy of our tax law all personal property employed in business in this state by non-residents is taxable in the towns in which the business is carried on. Rev. Stats. ch. 39, sect. 13.

By the 4th sect. of ch. 39, of the Revised Statutes, the assessors are to assess the tax at the time ordered by the town. It is true, that the only time fixed for the assessment of this tax by the town is to be inferred from their order that it should be paid in by the first day of September, leaving it for the assessors to assess it at such time as would enable it to be paid in by the time set for paying it. The statute is directory merely to the town as to fixing the time of assessment; and when no time is fixed by them, the assessors may fix it at a reasonable time, considering the other terms of the order. If it be objected that this was a Massachusetts corporation, and therefore taxable for its personal property in Massachusetts, we rely upon the express words of sect. 13, ch. 38, of the Revised Statutes, which provides that "merchandise" or "stock in trade," which includes both the money and goods of the defendants employed as capital in their business in Rhode Island, as it would include iron brought here to be manufactured into nails, or lumber to be used here in the building of ships. This action is expressly given by sect. 27, ch. 40, of the Rev. Stats.

W. H. Potter, for defendants.

The true construction of the vote of the town, passed April 7th, 1858, is, that the ratable personal estate then in the town was to be assessed; and the town alone by the statute has power to fix the time of the assessment, and thereby to direct what property shall be assessed. At the time of this vote the defendants had no property in the town, and so could not be liable to taxation.

The case is not within sect. 13, ch. 38, of the Revised Statutes. The goods of the defendants were not in Fall River, as "merchandise" or "stock in trade," that is, for sale, but for

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manufacture; and are no more liable to taxation than goods in transit. They were not "located in the town," in the sense of that section; but fugitive merely whilst being printed. The defendants, or their stockholders, were already taxed for these goods, with their other personal property, in Massachusetts; and to enforce this imposition would subject them to double taxation. The 14th section of ch. 38 guards our own citizens against this evil, when their property in other states is taxed, and thereby indicates that double taxation of the same property is against the policy of our law.

AMES, C. J. As the tax which this action is brought to recover is upon the personal property of a foreign corporation, it cannot be supported upon general principles, but must find its authority in some special enactment. We are pointed to the 13th section of ch. 38 of the Revised Statutes, which provides that "merchandise, stock in trade, lumber, and coal, stock in livery-stables, machinery, and machine tools, being in buildings or on wharves, or otherwise located in any town, and belonging to persons not residing in this state, shall be taxed to the owners, in the towns where the property may be when the tax is assessed."

With any fair attention to the settled distinctions of language, it is quite impossible for us to say that "merchandise" or "stock in trade" include goods in the course of manufacture; and it is not pretended that the property of the defendants, which has been taxed, falls within the other descriptions of personal property enumerated in this section. The word "*merchandise*," and phrase "*stock in trade*," are well understood to mean goods for sale,—a stock of goods offered for sale,—and this meaning accords precisely with their derivation. A state, the bulk of whose inhabitants derive their subsistence from manufacturing and mechanic labor, is the last in which we should assume that the legislature would subject to a special tax personal property owned abroad, and brought here to be worked upon; and by the specification in this section of "machinery and machine tools" as the subjects of local taxation, all other personal property of non-resident manufacturers and mechanics would seem, by implication, to be excluded from it.

The goods of the defendants, for which this tax was assessed upon them, were brought to Fall River to be bleached, printed, and finished; and when this work was done upon them, were to be carried back to Massachusetts, and from thence shipped, so that they might be put on sale as merchandise, and become parts of "stocks in trade." Goods in the hands of manufacturers or mechanics as the materials or subjects of their respective arts, are, in our judgment, no more subject to taxation under this section than goods temporarily stored or lying on wharves, waiting land transportation or shipment.

It is worthy of remark in this connection, that in the corresponding sections of the Massachusetts tax acts, from which this 13th section of our tax act was borrowed, the words are: "All goods, wares, and merchandise, or any other stock in trade, *including stock employed in the business of any of the mechanic arts,*" &c.; "All stocks in trade, *including stock employed in the business of manufacturing, or any of the mechanic arts,*" &c. The omission in our statute of the words here found, extending stock in trade to the stock of a manufacturer and mechanic, was undoubtedly designed; and the result is in accordance with the policy which might be expected to prevail here.

As this construction of the section disposes of the case before us, it is unnecessary to consider the other questions which have been raised and argued on it. Let judgment be entered for the defendants.

COUNTY OF KENT, SEPTEMBER TERM, 1860.

SETH W. WELLS & WIFE v. ELBRIDGE FAIRBANKS.

A testator devised to his two sons, W. L. C. and C. S. C. his Baker Farm and Morse Lot, "during the term of their natural lives, equally between them, and then to their children lawfully begotten, as follows, to wit:—The one half of said real estate to the child or children of the said W. L. C. or their descendants, if any such there be, and to their heirs and assigns forever, and the other half to the child or children of the said C. S. C. or their descendants, if any such there be, and to their heirs and assigns forever; Provided, however, that in case that either of my said sons, W. L. C. and C. S. C. shall die leaving no child or children or their descendants to take and hold as lawful heirs the portion of said estate herein given to such deceased son, then the same shall go to the child or children lawfully begotten of the other of my last-named sons or their descendants, if any such there be, and to their heirs and assigns forever; but in case of the failure of said estate vesting in the legal descendants of the said W. L. C. and C. S. C. in manner as aforesaid, then, and in such case, I give and devise said real estate to my said daughter H. M. C. as follows, viz.:—to take and hold the one half of said estate upon the death of the first of my said sons, W. and C., and the other half of said estate, upon the death of the other of my said sons, which shall be and remain to her my said daughter H., and to her heirs and assigns forever, provided that she dies leaving lineal heirs of her body; but, in case the said H. M. shall die leaving no child or children or their descendants to take and hold said real estate as lawful heirs, then, and in that case, I give and devise said real estate to my son, T. O. H. C. Jr., and to my daughter F. H. H., equally between them, and to their heirs and assigns forever." *Held*, upon the death of the testator's son, C. S. C., leaving no descendants,—the testator's son W. L. C. then living, but having no descendants,—that the half of the real estate devised to C. S. C. passed to the testator's daughter, H. M. C., so as to constitute her, the same being undivided, a tenant in common with W. L. C. or of his alienee of the same.

THIS was an action of waste, brought under the second section of chapter 204 of the Revised Statutes, by the plaintiffs, Seth W. Wells and wife, in right of the wife, whose maiden name was Henrietta Matilda Carpenter, and claiming that the said Henrietta was a tenant in common with the defendant in the place wasted.

The case was tried before Mr. Justice Brayton, with a jury, at the March term of this court for the county of Kent, 1860, when it appeared, that the title of the said Henrietta, if any, was derived under the will of her father, the late Dr. Thomas O. H. Carpenter. The defendant claimed, that at the time of

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the commission of the alleged waste, the said Henrietta, by the true construction of the will of her father, had no such interest in the place claimed to have been wasted as entitled her, under the statute, to maintain this action. The judge who presided at the trial having ruled that she was a tenant in common in the premises with the defendant, and the plaintiffs having recovered a verdict for damages for the waste done by him, the defendant now moved for a new trial, upon the ground of error in law in the above ruling.

The clauses of the will of Dr. Carpenter upon which the title of his daughter turned, and the facts which gave rise to the question, are sufficiently stated in the opinion of the court.

W. H. Potter, for the motion.

James Tillinghast, against it.

BRAYTON, J. This action was brought under section 2, of chap. 204, of the Revised Statutes, which provides, that "if any joint tenant, tenant in common, or coparcener, shall commit any waste on any estate by him holden in joint tenancy, tenancy in common, or coparcenary, without the consent of the other joint tenants, tenants in common, or coparceners, he shall forfeit double the amount of the waste so done, to be recovered by the other joint tenants, tenants in common, or coparceners, to their own use."

The question made by the motion for a new trial is, whether the plaintiff is within the provisions of the act. She claims to be a tenant in common of the premises with the defendant. It is denied that she has any estate in the premises. Her title, whatever it is, is derived to her under the last will and testament of her father, Thomas O. H. Carpenter, bearing date the 13th day of June, 1839, and duly admitted to probate on the 8th day of October of the same year. The devise is as follows, viz: —

"Fifthly, I give and devise to my said daughter Henrietta Matilda Carpenter, to hold during her minority, or until she shall arrive to the age of twenty-one years, in case she shall not have arrived at that age at the time of my decease, all the residue and remainder of my real estate in the town of Coventry, to wit: my Baker Farm and my Morse Lot, and for par-

ticular description of said real estate, and the boundaries and quantities of the same, reference being had to my deeds and conveyances thereof on record in said Coventry, the same will fully appear.

“Sixthly. I give and devise to my two sons, viz : William L. Carpenter and Christopher S. Carpenter, my said Baker Farm and Morse Lot, to take and hold the same from the time my said daughter Henrietta’s term shall expire therein if any she shall have according to the above gift to her, during the term of their natural lives equally between them, and then to their children lawfully begotten, as follows, to wit : the one half of said real estate to the child or children of the said William L. Carpenter or their descendants, if any such there be, and to their heirs and assigns forever, and the other half to the child or children of the said Christopher S. Carpenter or their descendants, if any such there be, and to their heirs and assigns forever. Provided, however, that in case that either of my said sons, William L. Carpenter and Christopher S. Carpenter shall die, leaving no child or children or their descendants to take and hold as lawful heirs the portion of said estate herein given to such deceased son, then the same shall go to the child or children lawfully begotten of the other of my last-named sons, or to their descendants, if any such there be, and to their heirs and assigns forever ; but in case of the failure of said estate vesting in the legal descendants of the said William L. Carpenter and Christopher S. Carpenter in manner as aforesaid, then, and in such case, I give and devise said real estate to my said daughter Henrietta Matilda Carpenter as follows, viz. : to take and hold the one half of said estate upon the death of the first of my said sons, William and Christopher, and the other half of said estate upon the death of the other of my said sons, which shall be and remain to her my said daughter Henrietta, and to her heirs and assigns forever, providing that she dies leaving lineal heirs of her body ; but in case the said Henrietta Matilda shall die leaving no child or children or their descendants to take and hold said real estate as lawful heirs, then, and in that case, I give and devise said real estate to my son Thomas O. H. Carpenter, Jr., and to my daughter Fanny H. Holden, equally between them, and to their heirs and assigns forever.”

It was in evidence on the trial, that the daughter of the testator, Henrietta, the plaintiff, was, at the time of the testator's decease, within the age of twenty-one years;—that the said Christopher S. Carpenter, named in the devise, died before the commission of the alleged waste, having had one child, but leaving no child living at his death; and that the said William L. Carpenter, named in said devise, is still living, having had no child. The plaintiffs claim, that under this devise, upon the death of Christopher S. Carpenter, an estate in one undivided half part of the premises, vested in Mrs. Wells, the plaintiff, and that the estate so vested was either an estate in fee-simple, or in fee-tail. The defendant insists, that no estate passed to her, but that the estate given by the devise to the said Christopher S. and William L. was an estate for their joint lives, and that upon the death of the said Christopher, the survivor, William L. Carpenter, succeeded to the whole for his life.

The language of this devise will hardly warrant the view taken by the defendant. The devise is, to William and Christopher, to take and to hold, it is true, "during their natural lives;" but to hold, not jointly, but "equally between them;" so that they were to hold several estates, and not to hold jointly. There is no provision that the share of either shall go to the other in any event, but to their children, if there be any; and that "as follows: one half of said real estate to the child or children of the said William," &c., "and the other half to the child or children of the said Christopher," &c.; showing that the testator contemplated that the sons should hold in moieties for their respective lives, and that upon the death of either, his share should go to his children, if there were any such, and not to the surviving brother. The language of the proviso makes this entirely clear: "that in case either of my sons shall die leaving no child or children or their descendants to take and hold as lawful heirs the portion of said estate herein given to *such deceased son*, then to go to the children of the other, &c., if any such there be." It is here provided that the several estates of each son shall, upon his death, go to his own descendants, if any he have; and if he have none, than to go, not to the surviving brother, but to the descendants of such survivor, if he

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have any, in fee-simple. But it is still further provided, "that in case of the failure of said estate vesting in the legal descendants of the said William L. and Christopher in manner as aforesaid, then and in that case, I give and devise said real estate to my said daughter Henrietta, as follows: to take and hold one half of said estate *upon the death* of the first of my said sons, and the other half upon the death of the other of my said sons." The estate of each, if it passed at all to the daughter, was to pass upon the death of such son; — the share of each upon the death of each. The state of things upon which the estate of either son passed, was, in the contemplation of the testator, to exist at the death of such son. If he left children or descendants, his share passed to them; if not, and the surviving son left such children or descendants, then to the descendants of such survivor; and if there were no descendants of either, then the estate was to pass to the daughter Henrietta, to hold to her and to the heirs of her body. Upon the death of Christopher without children, his share passed from him; and there being no children or descendants of the survivor William, the estate failed to vest in the legal descendants of Christopher and William in the manner provided, or in the descendants of either, and must by the terms of the devise pass to the daughter Henrietta, the now plaintiff. The motion for a new trial must therefore be denied with costs.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

6	479
8	374
13	487
6	479
18	213

FOR THE

COUNTY OF PROVIDENCE, SEPTEMBER TERM, 1860,
AT PROVIDENCE.

PRESENT :

HON. SAMUEL AMES, CHIEF JUSTICE.
HON. GEORGE A. BRAYTON, } JUSTICES.
HON. ALFRED BOSWORTH, }

DUVAL & IGLEHART v. WARREN B. MOWRY.

In trover by the vendor, for goods purchased on credit by the defendant by means of fraudulent misrepresentations of his own property and that of another by whose acceptances he secured payment for the goods, it is not necessary — the drafts being overdue and worthless from the insolvency of both parties to them at the time of action brought — to restore, or offer to restore, them to the defendant before the commencement of the action; but it is sufficient, if they are brought into court at the trial, to be impounded for the use of the defendant; and, in such case, cash and the note of a third person, originally, or before the discovery of the fraud, received by the vendor in part payment for the goods, need not be restored to the defendant at all, to enable the vendor to maintain such action against him for the balance of the goods included in the purchase, out of which he had been defrauded.

TROVER for the conversion by the defendant of a large quantity of copper whiskey and brandy in barrels, the property of the plaintiffs.

The case was tried at the September term of this court, 1859, before the chief justice, with a jury, under the general issue, and at the trial it appeared, that the liquors, which were the subject of the action, were bought at Baltimore, in Maryland, by the defendant of the plaintiffs, who were produce-dealers in that city, on credit, in three several parcels, on the 7th day of August and on the 17th and 30th days of September, 1858; payment to be secured by drafts drawn by the defendant upon one Philip K. Holbrook, of Boston, at four months, and by him accepted; that the credit was induced by false and fraudulent representations of the ability of the defendant and Holbrook to pay the drafts given to secure it; the defendant, who resided in Smithfield, Rhode Island, though doing business in Baltimore, being grossly insolvent, and Holbrook, whom he represented as worth from thirty to forty thousand dollars, being wholly destitute of property, — his household furniture having been mortgaged by him beyond its value, for five hundred dollars, to secure small loans of from ten to twenty-five dollars, from time to time made to him by the mortgagee. To prove the fraudulent design with which the above false representations were made to them by the defendant, the plaintiffs offered evidence of similar false representations made by the defendant in Baltimore, at or about the same time, to other dealers there for the purpose of giving credit to similar drafts and procuring credit upon the faith of them, without offering to prove that the plaintiffs, at the time they gave credit to the defendant, had any knowledge of such representations. The defendant objected to this proof; but the presiding judge, notwithstanding the objection, admitted the proof for the purpose for which it was offered, whereupon the defendant excepted. It further appeared, that the goods purchased by the defendant on the 7th day of August, 1858, amounting in all to \$1,396.94, were purchased partly by another person, one Silsbury, who accompanied the defendant at the time of the purchase, and that the defendant then stated to the plaintiffs "that Mr. Silsbury wished to ship with him, and that by buying so much, the plaintiffs would probably make the price less;" that "Silsbury would settle for his part, and the defendant for his part;" that thereupon Silsbury

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said to the plaintiffs, that "he had not quite cash enough," and offered to the plaintiffs, to make up the balance for his part, the note of one Franciscus, for the sum of \$275; that the plaintiffs hesitated to take the note, and the defendant said that "he was prepared to settle his part, as soon as the plaintiffs had agreed with Silsbury, and that he had nothing to do with Silsbury's bargain;" that the plaintiffs, after inquiring about the note of Franciscus, agreed to take it, when the defendant said "that the plaintiffs could make out the bill to him, and that he would settle with them for the whole, and would settle with Silsbury." The plaintiffs, accordingly, made out the bill for the whole purchase against the defendant, the goods being charged upon the plaintiffs' books against him, and in the settlement of the bill, the defendant gave to the plaintiffs the Franciscus note, as agreed, for \$275, and \$330.51 in cash, covering Silsbury's part of the purchase, and for his own part of it, two drafts upon Holbrook, one for \$352.23, and the other, for \$439.20. The plaintiffs claimed damages, and the verdict was for, only one half of the goods embraced in this purchase. The goods purchased on the 17th and 30th days of September, 1858, were settled for by the defendant wholly by drafts drawn by him on Holbrook, and accepted by the latter. It further appeared, that Holbrook and the defendant were, at the time the action was brought, without any visible property, and insolvent, and that the drafts given for the goods purchased of the plaintiffs were returned upon the plaintiffs protested, and were now brought into court to be impounded for the defendant's use.

In this state of the proof, the defendant called upon the presiding judge to instruct the jury, that the plaintiffs could not maintain the action, without restoring or offering to restore to the defendant, before bringing it, the money and note given to them in settlement of the bill of August 7, 1858, and the drafts upon Holbrook received by them in part settlement of that purchase, and in settlement of the purchases of September 17th and 30th of the same year. The judge refused this instruction, but ruled *pro formâ*, and for the purposes of this trial instructed the jury, that if they were satisfied, from the proof, that the goods, for which damages are

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claimed by the plaintiffs, had been obtained from them by the false and fraudulent representations of the defendant, they might maintain this action against him therefor, without restoring or offering to restore, previous to the commencement of the action, the said money, note, or drafts, or either of them; and, so far as the goods purchased on the 7th day of August, 1858, were concerned, could maintain their action for the value of one half thereof without restoring or offering to restore to the defendant, at any time, the note and money received by the plaintiffs for the other half of said goods.

Under these instructions, the jury having returned a verdict for the plaintiffs for their damages, assessed at \$1,396.25, the defendant now moved for a new trial, for errors of law in the above instructions, and in the admission of the evidence of other fraudulent representations than those made to the defendant.

The motion was argued upon briefs, which were not handed to the court until this term.

Payne, for the defendant, abandoned the ground of the motion founded upon the admission of evidence of other false and fraudulent representations, for the purpose specified, than those made to the plaintiffs, as settled by authority; but contended that the presiding judge erred in instructing the jury, that the plaintiffs could maintain this action, which proceeded upon the idea of a rescission of the contracts of sale, without restoring, or offering to restore, before commencing the action, the money, drafts, and note received from the defendant, or without at any time restoring, or offering to restore, the money and note. 2 *Parsons on Contracts*, 277; *Kimball v. Cunningham*, 4 *Mass.* 502; *Conner v. Henderson*, 15 *Ib.* 319; *Miner v. Bradley*, 22 *Pick.* 457; *Thayer v. Turner*, 8 *Met.* 550; *Martin v. Roberts*, 5 *Cush.* 126; *Cook v. Gilman*, 34 *N. H.* 560; *Ketletas v. Fleet*, 7 *Johns.* 324; *Voorhees v. Earl*, 2 *Hill*, 288; *Masson v. Bovet*, 1 *Denio*, 29; *Hunt v. Silk*, 5 *East*, 449.

Eddy, for the plaintiffs,

To the admissibility of other similar false and fraudulent representations, made at or about the time of those made to the plaintiffs, for the purpose of proving the design of the latter, cited 1 *Starkie on Ev.* 15, 18, 352, 465; 1 *Phillips on Ev.*

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116-139, n., 333, 352, 452, n., 465 ; 1 Greenl. on Ev. § 53, p. 74, and cases cited ; *Rowley et al. v. Bigelow et al.* 12 Pick. 307 ; *Gardner v. Preston*, 2 Day, 205 ; *Allison v. Mattieu*, 3 Johns. 235 ; *Seaver v. Dingley*, 4 Greenl. 230 ; *McKinney v. Dingley*, Ib. 306 ; *Cary et al. v. Hotailing et al.* 1 Hill, 311 ; *Hall v. Naylor*, 4 Smith, Court of Appeals, 588.

To the point that the restoration, or offer to restore the drafts, before the action, or the note and cash at any time, in trover for goods obtained by a fraudulent purchase, was unnecessary, he cited *Ladd v. Moore*, 3 Sandf. Sup. Ct. R. 589 ; 2 Parsons on Contracts, 277 ; *Frost v. Lowry*, 15 Ohio, 200 ; *Pierce v. Wood*, 3 Foster, 520 ; *Martin v. Roberts*, 5 Cush. 126 ; *Levens v. Austin*, 1 Met. 557 ; *Poor v. Woodburn*, 25 Verm. 234.

AMES, C. J. The first ground for new trial set down in this notice has been abandoned at the argument ; and, indeed, it cannot be doubted, both upon principle and authority, that evidence of similar false and fraudulent representations made by the defendant to others, at or about the time such representations were made to the plaintiffs, and for a like purpose, is admissible to show, that the latter representations were not casual or misunderstood, but were made with design, and in furtherance of a fraudulent scheme directed against others as well as the plaintiffs. The well known rule admitting other instances of the prisoner's passing counterfeit bank bills, in order to show that he *knowingly* passed those for which he is indicted, is a sufficient warrant for this ; and has been extended by this court to the admission of evidence that the prisoner, at or about the same time, passed *spurious* bank bills, for the purpose of proving the *scienter* in his passing the particular *counterfeit* bank bill charged in the indictment. *State v. Brown*, 4 R. I. 528, 538, 539.

The other questions raised by the motion are of more difficulty, and demand a more extended consideration.

The right of a party who has been deprived of his property by fraud in the guise of a contract of sale, to avoid the contract, whether executory or executed, is an important practical right ; and in his pursuit of it, whether at law or in equity, he should be defeated or delayed by no technicalities, and embar-

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passed by no empty ceremonies. To retake his own from the wrongdoer, with or without legal process, as the circumstances of the case may justify or require, or if it be sold or secreted, to be able promptly to direct against him the most stringent remedy for damages, is what he may demand as accordant with the spirit of all civilized jurisprudence. The substantial rights even of a fraudulent person proceeded against should, undoubtedly, be respected; but beyond this, little form or ceremony need be used towards him to compel him to disgorge his ill-gotten gains. If the person defrauded, after obtaining knowledge of the fraud, either by express binding agreement or by his conduct, ratifies the contract fraudulently procured from him, it is his right to do so; and having done it, he must be deemed to have waived all remedy for the fraud. If there has been no such waiver, he, nevertheless, should not be permitted to rescind the contract on his part, without a substantial restoration to the other party of all that he has received by virtue of it. He may not have replevin or trover for his goods, which actions proceed upon the idea of the rescission of the contract of sale, but will not, therefore, be without legal remedy for the fraud practised upon him; but may have an action for deceit, which proceeds upon no such notion. But why should the injured party be deprived of any remedy which the law gives for such a wrong, because he has not performed an useless ceremony?

We ask this question in application to the defendant's ground, that this action is not maintainable against him, because the plaintiffs did not, prior to its commencement, restore or offer to restore to him the drafts accepted by Holbrook. Now the evidence finds, that these drafts were, at the time the action was brought, if not before, utterly worthless; the defendant, the drawer, and Holbrook, the acceptor, being without visible means of payment or any property whatsoever, and greatly insolvent. There is no pretence, in fact, that the defendant has been injured by keeping them back; and they were brought into court at the trial, and are now impounded for his use, with as much value attached to them as they ever possessed. It appears, therefore, that the defendant insists in his defence, that a wholly useless ceremony has not been performed with

regard to them. Undoubtedly, his substantial rights ought not to be sacrificed by the omission on the part of the plaintiffs, of any act in the rescission of the contract which is necessary to secure them ; but with what face can he claim, as a bar to substantial justice, that mere forms and ceremonies have not been practised towards him ? It is in our judgment quite enough that he should not be really prejudiced by the rescission of the sale which his fraudulent representations procured ; that to do the plaintiffs justice, no injustice should be done to him.

Where, indeed, a contract of sale is rescinded under some term contained in it, or from some unexpected failure of consideration, or mere breach of its conditions, the general rule is, that to enable one party to treat it as rescinded, he must first return to the other all that he has received by virtue of it. But the rule, even in such cases, does not apply to things merely collateral to the contract and subject of sale ; so that in *Wilkinson v. Lloyd*, 7 A. & E. (N. S.) 27, which was assumpsit to recover the price of certain shares in a coal company, the transfers of which, the directors of the company, under a clause in its deed of settlement, refused to sanction, it was held, that although the defendant had a right to require the redelivery of the transfers to him, yet that the return or cancellation of them was not a condition precedent to the maintenance of the action. Now, the drafts drawn by the defendant, and by him accepted, were not the consideration stipulated for the liquors sold to the defendant ; that was so much money, the drafts being merely security for its payment ; so that when the drafts became due and were unpaid, the plaintiffs might sue for the price of the liquors, bringing the drafts into court to be impounded, in the event of judgment, for the benefit of the defendant. It would be difficult to distinguish this case, upon principle, from the case of *Wilkinson v. Lloyd*, within the most rigid requirement of tender before action, applicable to cases of the rescission of contracts on account of an honest failure of consideration.

But we do not hold that the rigid rule of tender before action, known to rescission under and by virtue of a contract, applies to cases of the avoidance of a contract on the ground of fraud. In the former case, the pursuing party is dealing with one pre-

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sumed to be honest, and can afford to wait — in the latter, with one who has defrauded him in the very matter of the suit; and he should be delayed by no useless ceremony in the way of the prompt recaption of his goods, or of the service of his writ in a suit for damages for the tortious conversion of them. Such a condition to a remedy in such a case is wholly unknown in courts of equity, where cases of rescission or cancellation of contracts on the ground of fraud usually come; the court deeming it quite sufficient to provide that justice be done to the injurious, as well as to the injured party, by its own action. Adams's Equity, 171, and cases cited. No good reason can be given why, when courts of law deal with the rescission of contracts on the ground of fraud, they should not do so, so far as the nature of their remedies will permit, upon the same footing with courts of equity. This was both the view and course of Lord Alvanley, when sitting as a law judge in a case of the rescission of a contract from failure of consideration which was brought before him. *Johnson v. Johnson*, 3 B. & P. 162, 169, 170. So far as the drafts in question are concerned, this is easily done, and in accordance with well-known legal analogy, by requiring them, instead of being tendered before action, to be brought into court at the trial, and impounded for the benefit of the defendant.

The case of *Ladd v. Moore*, 3 Sandf. Sup. Ct. R. 589, is in entire accordance with these views. In that case the plaintiffs, who had been defrauded by false representations with regard to the property of the defendant, into selling him some four hundred and eighty dollars' worth of silver ware, for which they received from the defendant two hundred dollars in cash, and his promissory note at sixty days for the balance, upon the discovery of the fraud, brought trover for the goods, without first tendering to the defendant the note, and without offering in court to return the two hundred dollars. The note having been brought into court at the trial for the use of the defendant, a motion to set aside a verdict for the plaintiffs, for the value of the ware, less the two hundred dollars paid, was refused, although there, as here, it was claimed that no such tender of money or note had been made. It is said by the counsel for

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the defendant, that the facts of that case showed, that the plaintiff could not, upon search, find the defendant to make the tender before the action was brought. In their judgment, however, the court do not notice this fact as having any bearing upon the question of tender, but only upon the demand of the goods before action, as evidence of conversion. With regard to there having been no offer to restore the note before action, or the money at any time, the court say: "It is undoubtedly true, as a general rule, that a party who would disaffirm a contract, must return whatever he has received upon it. But, surely, they must be upon the condition, that the party returning shall thus restore himself to his own original position; else, in case of fraud, the party committing the fraud might, as in this case, place himself in a situation in which he could not restore, and yet the injured party shall have no redress, through a proceeding to arrest the person of the defendant, unless he restores all that he has received, and obtains nothing but a judgment, which, in a majority of instances, proves worthless. Most of the cases in which the rule is laid down relate to executory sales, and where, on the ground of failure to fulfil, the other party seeks to rescind. Few cases relate to transactions which are fraudulent and void. See *Voorhees v. Earl*, 2 Hill, 288, opinion of Cowen, J., and cases cited. Suppose, in this case, the plaintiff, before suit brought, had found the defendant, and had tendered to him the note and the two hundred dollars, and demanded the return of the property, which had been refused, he certainly would not have been obliged to leave the note and money with the defendant before he could proceed in trover against him. Upon the trial, the plaintiff was, certainly, not obliged to do more than he would have been before the commencement of the suit, except as to the note. On the trial, he must tender the note, because that is merged in the judgment; and being transferred, might otherwise have been held by *bonâ fide* holders, and the defendant thus be made twice liable. But, on the trial, there was no pretence that the defendant had the silver ware in court to return to the plaintiff, on recovering his note and the two hundred dollars. If he had been solicitous

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upon this subject, he might have brought in the property and tendered it, and if the plaintiff did not voluntarily consent to receive it and return the note and money, the court would most probably have made an order, by which judgment would not have passed against him. Selwyn's N. P. 1303, 1304; 7 T. R. 53. But says *Cowen, J.*, in *Voorhees v. Earl*, speaking of the rule where a party desires to rescind, he need do so *in toto*; "even in a case of fair sale, the rule is not universal. We do not think that it can or ought to be applied to this case. *Ib.* 392, 393."

In the case at bar, as well as in the case just cited, the defendant had, long before the action, disabled himself from restoring the goods of the plaintiffs; having sold and shipped them to Holbrook, as he himself swears, so that out of the proceeds Holbrook might be enabled to meet these very drafts which were turned over to the plaintiffs.

In *Thurston v. Blanchard*, 22 Pick. 18, the supreme court of Massachusetts held, that the vendor need not tender or return before action, the vendee's due note, and in *Frost v. Lowry*, 15 Ohio, 200, the supreme court of Ohio, that he need not tender or return the accommodation acceptance of another given for goods sold under fraudulent misrepresentations, in order to maintain trover for his goods against the vendee; it being sufficient that the note or draft had never been negotiated, and was produced at the trial and offered to be surrendered and placed on the files for the defendant's use. The reason given is, that the defendant could not be prejudiced by the want of such previous tender; and the rescission of the contract of sale rescinded the note or contract of payment by the vendee.

In *Poor v. Washburn*, 25 Vt. 234, which was replevin for goods procured by purchase through fraudulent misrepresentations of the purchaser as to the value of the note of a third person given in payment for them, *Redfield, C. J.*, in noticing that there had been no tender of the note to the defendant before action, says: "If the plaintiff has parted with the note, he could not return the property, even when he proved the most unequivocal fraud, and upon the trial he should be required to furnish the note;" and again, "As the vendor would clearly not

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be required to surrender the securities until he could obtain a surrender of the goods, the mere form of offering the note in exchange for the goods would seem very idle."

Even in the case of *Coolidge v. Brigham*, 1 Met. 547, cited for the defendant, the court, though holding that the note of a third person should be returned before commencing an action founded upon the rescission of a sale on the ground of fraud in the purchase, after noticing that the note, which had upon it two forged indorsements, was not proved, so far as the maker was concerned, to be worthless, say, "It is true that eventually the note may become of no value, either by the death or insolvency of the maker, or otherwise; but this possibility does not excuse the plaintiff from not returning the note. He must, if he undertakes to rescind the contract, either restore the note, or prove clearly that in no event can it be of any value. This he has failed to do, and cannot, therefore, be allowed to treat the note as a nullity." *Ib.* 550. Now, without adopting the decision in this case as a proper application to it of the law respecting the rescission of contracts on the ground of fraud, unless, indeed, upon the supposition of the counsel for the plaintiffs, that the vendor did not offer at the trial to restore the note, yet, as we understand the judgment of the court, they would have deemed the prior tender of the note unnecessary, if the note had been proved to be worthless through the *present* insolvency of the maker of it. In this view of the decision, it cannot help the defendant in the case at bar; the proof showing that both the defendant, the drawer, and Holbrook, the acceptor, of these drafts, were insolvent.

It is further objected, however, to the defendant's right to rescind the sale of August 7, 1858, that neither before commencing this action, nor at the trial, did the plaintiffs restore, or offer to restore, Francisus' note for two hundred and seventy-five dollars, nor the cash, three hundred and thirty dollars and fifty-one cents, both received from the defendant for Silsbury's half of the purchase, though they offered, at the trial, to restore Holbrook's acceptances, received for the other half.

The evidence clearly showed, that Silsbury was the purchaser of one half of the whiskey embraced in the contract of sale of

that date, dealing personally with the plaintiffs for his share of the purchase, and separately arranging with them, and, by the hand of the defendant, actually paying them for his half thereof in the cash and note in question. This payment discharged Silsbury from all responsibility to the plaintiffs; and it is apparent, that it was only for convenience in entering the transaction in the plaintiffs' books, that the whole purchase was at the defendant's suggestion, charged to him, and he, on the other hand, credited with the note and cash, in reality, through him, received from Silsbury. With what justice can the defendant then claim that the plaintiffs should restore to him this note and cash. Looking behind the mere form of the transaction, at its substance, it is evident that the credit to the defendant was merely for one half the purchase, the other half having been paid for by Silsbury. If the note and cash were to be returned to any one, it should be to Silsbury, from whom they were received. *He* cannot, however, claim them, since he received for them all the value for which he stipulated; and the defendant, certainly, cannot, since in handing them to the plaintiffs he acted only as Silsbury's agent, in carrying out Silsbury's contract, made personally with the plaintiffs. The verdict of the plaintiffs, embracing only one half of this purchase, being the half covered by Holbrook's drafts, the defendant has no cause to complain.

But even upon the defendant's view of the transaction of August 7, that the purchase and settlement by note, cash, and drafts, were, as between him and the plaintiffs, made by him and not by Silsbury, we do not see upon what grounds of justice the plaintiffs should, because they have received, as stipulated, payment at the time for one half of the purchase, be precluded from retaining this payment, and yet avoiding the other half, in the payment for which they have been defrauded. By originally receiving the note and cash, they cannot be said to have ratified the fraudulent contract, since they did not then know of the fraud; and, as suggested in *Ladd v. Moore, supra*, it would be a singular application of the equitable notion, that upon the rescission of a contract *both* parties should be restored to their condition prior to it, to require the plaintiffs, who, in

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retaining this note and cash, retain only what they are entitled to by their contract, to give them up to the fraudulent purchaser for the doubtful, or rather desperate, chance of getting their value, and something more, back again, in the shape of damages in trover. We should reject the whole spirit of the rule of rescission, if, in thus applying it, we clung to the letter, in which, without qualification and in other applications it is sometimes expressed. If, indeed, the plaintiffs had been warranted in retaking, and had actually retaken upon replevin, all the goods embraced in the sale of the 7th of August, they could not, in justice, be permitted to retain them without restoring the note and cash given for them by way of part payment; but we can see no reason why they should not retain their verdict for damages against the defendant, for that portion of their goods out of which he at that time defrauded them.

This motion must, upon all the grounds stated in it, be denied, and judgment be entered upon the verdict.

WILLIAM M. BAILEY, Trustee, v. TRUSTEES OF POWER STREET
METHODIST EPISCOPAL CHURCH.

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A pewholder in a church, whose deed from the society before it was incorporated expressly subjected his pew to all rates and taxes imposed thereon by the trustees for expenses and repairs, cannot object to the repeal, without his assent, of a clause in the charter, subsequently obtained, which required the assent of a majority of the pewholders to the imposition by the trustees of any pew tax, where the general assembly have expressly reserved to themselves the power in the charter to alter, amend, or repeal it at pleasure; nor is notice to the pewholder of the pendency of the petition to the assembly for such repeal, in conformity with ch. 2, sect. 1 of the Revised Statutes, indispensable to the act of repeal.

BILL in equity by the complainant, as the owner of two pews in the Power Street Methodist Episcopal Church in Providence, to restrain the trustees of said church from selling said pews for the non-payment of a tax assessed by them thereon. The bill alleged in substance that Samuel B. Mumford, of whose estate

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the complainant is testamentary trustee, purchased two pews—one in 1833 and the other in 1835—in the Power Street Methodist Church, the deeds of which, from the trustees of said society, not then incorporated, amongst other things, provided, that no right was thereby transferred to the said “Mumford, his heirs, executors, administrators, or assigns to interfere in any way whatever with the concerns and management of the house, or of the government of the church or of the society, or with any church meeting that may be held in said house;” and that if said “Mumford, his heirs, &c., shall neglect to pay to the treasurer of the aforesaid society, the several rates and taxes that shall be levied and assessed by the aforesaid society on said pews, for the purpose of raising money to defray the expenses, and of necessary repairs made, or to be made, on said house, or the lot of land on which said house is built, together with all the moneys that may be due to said society from said Mumford,” that said pews should revert to the society and be sold by them for the satisfaction of such rates, taxes, and dues, and the balance, if any, paid over to said Mumford; that in 1841 the general assembly incorporated the trustees of said society by the name of the “Trustees of the Power Street Methodist Episcopal Church,” authorizing said trustees, amongst other things, from time to time, as might be required, “*provided a majority of the pewholders assent thereto*, to assess a tax on all the owners of pews in said church, on their original valuation, for the purpose of raising money to defray the expenses for repairs made, or to be made, on said church, or on the lot of land on which said church is built, and for insuring the same,” with a power to sell the pews in the event of non-payment thereof—said act of incorporation concluding with the usual clause, that “this act shall be subject to all future acts of the general assembly in amendment, or repeal thereof, or in any way affecting the same;” that in the winter of 1858–9 an amendment of said charter was procured by the trustees from the general assembly, by which they were empowered “to assess and levy upon the pews in any meeting-house, owned or occupied by said church, in a ratable proportion to the fixed valuation of such pews, and to collect from the owner or owners thereof, all sums of money

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that said corporation may vote to be necessary and requisite for the support of public worship, for all repairs and insurance of said meeting-house, and for the improvement of the lot on which it stands," with power of sale, &c., and repealing so much of the former act as is inconsistent therewith; that said act in amendment was procured to be passed without any notice given to the complainant or other pewholders in said church; that under it the trustees have assessed a tax upon the pews of the complainant without first obtaining the consent of a majority of the pewholders, and for non-payment of said tax, have notified him that they shall proceed to sell his pews — from which sale the bill prays the court to enjoin them.

To this bill the defendants filed a general demurrer.

Hayes, for the respondents.

1. The amendment of 1858 is not invalid for want of notice to the complainant of the preferring of the petition therefor, because the defendant was not entitled under the statute to notice, or, if entitled, the statute was repealed, as to this petition, by the act of the assembly passing this amendment.

2. The amendment of 1858 does not impair the obligation of any contract, and is not therefore unconstitutional. The assembly, in the charter of 1841, expressly reserved the power to amend or repeal the same; and the complainant held his pews subject to this reserved power, so that the exercise of it by the general assembly cannot impair the obligation of his grants of the pews. *Dartmouth College v. Woodward*, 4 Wheat. 712, Story, J.; 2 Kent's Com. 306; Angell & Ames on Corp. § 767; *Wales v. Stetson*, 2 Mass. 143.

Bradley, for the complainant, contended, that the amendment of the act of incorporation in 1858, dispensing with the assent of the pewholders to a tax upon the pews, was void, because passed without notice to them, and without their consent; and asked the court, at least to suspend all action of the defendants under it, until action could be had in the assembly upon a petition of the complainant and other pewholders, now pending before that body.

AMES, C. J. The original deeds, under which the complainant derived his title to his pews from this church society before

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it was incorporated, expressly subjected them to such rates and taxes as might be imposed thereon by the society for general expenses, and for repairs both of the church and lot; and when the society became incorporated, although the charter required the assent of a majority of the pewholders to the validity of every pew-tax, yet the general assembly reserved to itself, in the amplest terms, by the last section of the charter, the power to alter, amend, or to repeal it at pleasure. As his deed did not, so neither did the charter give to the testator of the complainant or to his assigns any vested right to immunity from taxation, unless the tax was assented to by a majority of the pewholders in the church. This was his right only during the pleasure of the general assembly; and when, at their January session, 1858, the assembly exercised their pleasure, by restoring to the society the untrammelled power to tax the pews according to the tenor of the deeds of the pewholders, they certainly impaired the obligation of no contract contained either in the deeds or the charter, and derogated from no right or interest of the pewholders of a fixed or permanent character. The amendment to the charter complained of, is equally within the control of the assembly, as the original clause which it amended; but we do not see why the pendency of the petition of the pewholders before the assembly, calling upon them to correct their former action as unadvised, should induce us to stay the collection of a tax which has been legally assessed.

In such a case notice, though proper, cannot be necessary to the validity of the act which the assembly had reserved to itself the unconditional power to pass; and granting that the case falls within the scope of ch. 2, sect. 1 of the Revised Statutes requiring notice to be given to parties in interest on all petitions to the general assembly affecting the rights or interests of any person, the special act itself, passed by the assembly without such notice, must be regarded as a legislative dispensation therefrom, or a repeal of the general statute requiring notice, *quoad* this particular case.

The demurrer must therefore be sustained, and the bill of the complainant dismissed with costs.

STATE (on the complaint of Augustus Moffett) v. JOB BORDEN.

The wife of one who prosecutes criminally for an assault and battery committed upon her person is a competent witness to sustain the complaint, notwithstanding her husband has entered into a recognizance, as required by statute, to pay costs in the event that the prosecution fails.

THIS was an appeal from the sentence of a justice of the peace, upon a warrant for an assault and battery upon one Clorinda Moffett, issued upon the complaint of her husband. At the trial of the appeal before Mr. Justice *Shearman* with a jury, at the December term of the court of common pleas for the county of Providence, 1859, the prosecutor, to maintain his complaint, called his wife as a witness; whereupon it was objected, that she was incompetent to support the complaint of her husband, on account of his liability for costs in case of his failing to make good his complaint. The court admitted her to testify, notwithstanding the objection; and the defendant, being convicted, brought his exception to the ruling, to this court, for review.

Thurston & Ripley, in support of the exception, cited 1 Greenleaf's Ev. § 334; Gilbert's Ev. 133, 134; Bac. Abr. Evidence, A. 1; 2 Hawkins's P. C. ch. 46, §§ 70, 71; *Edwards v. Pitts*, 3 Strobb. 140; *Pyle v. Moulding*, 7 J. J. Marsh. 202; *Fitch v. Hill*, 11 Mass. 286; *City Bank v. Bangs*, 3 Paige, 36.

Ballou & Brownell, for the prosecution, cited *Littlefield v. Rice*, 10 Met. 287; *Stanton v. Wilson*, 3 Day, 37; *Pedley v. Wellesley*, 3 Car. & P. 558; *Baring v. Reeder*, 2 Hen. & Munf. 154, 168; *Griffin v. Brown*, 2 Pick. 308; 2 Stark. Ev. (4th Amer. ed.) 708, 709; 1 Greenl. Ev. § 334.

AMES, C. J. The prosecutor, even when interested in costs to make good his complaint, has, upon the ground of necessity or policy, been ordinarily admitted here as a witness; and the practice seems to be sufficiently sustained by authority. *The Queen v. Muscot*, 10 Mod. 193. 1 Chitty's Crim. Law, 596 & cases cited. In case of a complaint for threats against the

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person or property of another, although the statute requires from the complainant a recognizance to pay costs in the event of failure, yet it expressly makes it the duty of the magistrate judicially to inquire into the truth of such complaint, "by the oath or affirmation of *the complainant* or witnesses, as well for as against the accused." Rev. Sts. ch. 220, § 6. It can hardly be supposed that when violence to the person has actually been done, a similar requirement as to costs, made to save the state from the expenses of groundless prosecutions, was designed to exclude the only evidence by which, in general, the complaint could be sustained.

This policy applies with quite as much force to admit the testimony of the wife of the prosecutor, in case of violence to her person, as to admit his. For her protection she may in such case testify against her husband, if the author of the violence, (1 Chit. Crim. Law, 595, n. B.,) and still more should she be permitted, for the same reason, to testify against a third person who has committed violence upon her, when her husband, as it is his peculiar duty to do, prosecutes for such an offence.

The exception is overruled, and sentence must follow the verdict.

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 STATE v. THE TOWN OF CUMBERLAND.

The liability of a town to repair a highway within its limits may be proved, upon an indictment against it for neglecting to repair, by the assumption by the town of the duty to repair and actually repairing the same from time immemorial; the 24th and 25th sections of chapter 48 of the Revised Statutes not being construed to change the common law in this respect, nor the 16th section of the same chapter, and those immediately following it, to abrogate the liability of a town to repair, fixed before the passage of that portion of the statute.

INDICTMENT against the town of Cumberland, for not keeping in repair a highway within the limits of said town. The indictment was tried at the present term of this court before Mr. Justice *Bosworth* and a jury: and at the trial the defend-

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ant requested the judge to instruct the jury, that if the jury found that the portion of the highway charged in the indictment to be out of repair was a highway only by user, and was not over a dividing line between towns or states, and was not found to have been actually laid out, or expressly declared a highway, by the town council of the town of Cumberland, they must return a verdict for the defendant, although the repairing of said highway may, from time immemorial, have been assumed and done by said town. The judge refused so to instruct the jury, but did instruct them, that the town might be liable, if it had assumed to make and had made repairs on the highway from time immemorial.

Under this instruction the jury having returned a verdict of guilty against the defendants, a motion was now made for a new trial, upon the ground that the instruction was erroneous in matter of law.

Weeden, for the motion.

Payne & Colwell, against it.

BOSWORTH, J. In this case, exception is taken to the charge given by the judge to the jury, on the trial of an indictment against a town for neglecting to repair a highway. The defendant claimed, that the town was not liable for neglect to repair a highway which was such by user, unless the same was proved to have been declared to be a public highway by the town council of the town. The court instructed the jury, that if the proof in the case was such as to satisfy them that the highway had been immemorially used by the public as a highway, and had been immemorially repaired by the town, they might find it a public highway which the town was bound by law to keep in repair. There is no doubt that at common law, such proof is sufficient to establish the existence of the highway and the liability to keep it in repair.

The exception is grounded on the 25th section of chapter 43, of the Revised Statutes. That section is immediately preceded by a section in affirmance of the common law, providing that nothing in the chapter of which it is a part, which is the general highway act, shall be construed to hinder or prevent the public from acquiring by dedication or user, lands, or any in-

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terest in lands, for highways or other public uses, according to the course of the common law; and section 25 provides, that the section preceding shall not be construed to render any town liable for repairing or amending a highway, unless it shall have been declared to be a highway by the town council of the town wherein it lies. The last of these sections refers only to the other: its purpose is to rebut any inference that might arise from establishing a right of highway in the public by user or dedication, with regard to the duty of the town to repair. The obligation on the part of the town to repair is left to be ascertained or proved, independently of the 24th section. Section 25 does not profess to relate to any other part of the statute, or to the common law obligations of the towns. At common law, although there may be a right established by use by the public of lands dedicated to the public use, the liability to repair will not be created unless by some act of acquiescence or adoption. See 2 Greenleaf on Evidence, 552. The statute provides, (§§ 16-21, ch. 43, Rev. Stats.) that lands used for public highways for twenty years may be declared by the towns to be public highways, and taken and used as public highways, as fully and effectually as if regularly laid out and established. This proceeding renders the town liable, and the 25th section acknowledges this liability, leaving all other liability to rest upon law independently of the preceding section, from the terms of which no liability is to be construed to arise. No change is made in the law affecting the liability of the towns to repair and amend the highways, as existing by force of the statutes, or as arising under the common law.

The highway in question was established as a public highway by use; and the town, by immemorial repairs, had recognized and fixed its liability long before this statute was passed. We do not think it was the intent of the statute to change the common law in this respect, or to exempt the towns from liabilities fixed by their acts under the law, prior to its passage. If the doctrine contended for by the defendants' counsel were established as law, many, if not most, of the highways in Cumberland, and in the other towns which came under the jurisdiction of this state in 1746, and which have been used by the public

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and kept in repair by the towns for more than a hundred years, would cease to be highways which the towns are under obligation to repair.

The motion is denied with costs.

CLARK WALLING v. ESTEN ANGELL & others.

An agreement to pay money, procured by the plaintiff from those preferred in a will by concealing, after the death of the testator and before probate, the place of its deposit, and by threatening to destroy it, is illegal and void; and finds no support in the fact, that the testator himself placed it in the hands of the plaintiff's son, and under the plaintiff's sole control, with full authority to the latter to use it for such extortion.

ASSUMPSIT upon the following agreement, signed by the defendants:—

“ \$900.

Burrillville, Sept. 26, 1855.

“ We severally and jointly promise to pay Clark Walling the sum of nine hundred dollars, in two years after date, without interest, providing the last will of our father is brought forward, approved, and allowed.

“ As witness our hands, &c.”

At the trial of the case, under the general issue, before the chief justice with a jury, it appeared, that the defendants were the sons, and the plaintiff, one of the sons in law, of Randall Angell, late of Burrillville, and that the agreement upon which the suit was brought was obtained under the following circumstances, disclosed by the testimony of the plaintiff; that some time in the year 1850 or 1851, the said Randall came to the plaintiff's house in Burrillville, and after considerable conversation, produced and desired the plaintiff to take charge of, his last will and testament; that the plaintiff declined the charge, although at the request of the said Randall he read the will, and by his leave took some minutes from it; that said Randall then went away, saying as he left, “that he would leave his

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will somewhere in North Providence or Smithfield, and would let the plaintiff know where," and also saying, "that he would not leave it among the Angells," assigning as a reason, "that his boys got it once, and cancelled it, and he did not mean that they should get it again;" that the said Randall took away his will with him, and in two or three days came back with it, and again tried to induce the plaintiff to take the custody of it, which the plaintiff again declined to do; that the said Randall then placed the will in the hands of one Aaron Walling, son of the plaintiff and his own grandson, directing the said Aaron to take charge of it until he called for it, and if he did not call for it, to deliver it to the plaintiff after his decease, if the plaintiff called for it, and to no one else; that the said Randall told the plaintiff that he had thought a great deal about this of late, and that he wanted his daughter's children should share about equal with his son's children; that he did not know why his daughter's children were not as near to him as other men's daughter's children, — and, in conclusion, said to the plaintiff, "that he wanted the plaintiff to have half of the farm in North Providence, and half in Smithfield, and when it was sold, he wanted him to buy the other half;" and that he wanted the plaintiff, "after his decease, to go to Esten (his son) and have no talk with any one else of the family, as he thought Esten would do what was right, and tell Esten his wishes," and that, "if Esten would not do about what he (the plaintiff) thought was right, that he (the plaintiff) might get the will and destroy it, if he was a mind to, and then he would be sure of getting his rights;" that said Aaron took the will and kept it until after the said Randall's death, when the plaintiff went to Esten Angell, one of the testator's sons, as directed by the testator, and told him the conversation which the testator had had with him, and informed him that the testator had said that he did not want the Ballous to have any of his property, and also told Esten "that he had not got the will, but supposed that he could find it," but did not tell him where the will was; that he and Esten had some considerable negotiation about what amount should be given to the plaintiff to bring forward the will for probate, Esten in the mean time looking and searching for it

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in North Providence and Smithfield, and that afterwards, the agreement upon which the suit was brought was concluded upon between the plaintiff and the defendants in consideration that the plaintiff would tell where the will was, or have it brought forward and approved and allowed; that the plaintiff got the will and produced it to the court of probate, and the same was approved without opposition; that there were other heirs of the testator, besides his sons, who would have received a share of his property had there been no will; but by the production of the will they took no share, and the defendants received a much greater share than they would have done had the estate been intestate. Upon the back of the agreement, there was the following indorsement:—

“Burrillville, Sept. 29, 1855. Received ten dollars of Esten Angell, it being no part of the within.”

The plaintiff further testified that the said Esten Angell made the payment to him thus indorsed.

The above testimony of the plaintiff being in, and the counsel for the plaintiff stating in reply to an inquiry of the presiding judge that his further testimony would be only in corroboration of this, the judge declined to hear the plaintiff's counsel argue the questions of law raised by the above testimony, and instructed the jury, that according to it, there was no legal consideration for the agreement, and it appeared to have been obtained by a species of duress;—that the testator had no right to give, or the plaintiff to act upon, the direction given by the testator with regard to the concealment or destruction of his will, as he could not revoke his will in that way;—that the stipulation in the agreement concerning the approval of the will furnished no consideration in support of it, unless it was also proved that there was reasonable ground for opposition to the probate of the will; and that if the jury found the facts testified by the plaintiff, and that the will was kept back by the plaintiff in concert with his son until the agreement sued was made, they should upon that ground return a verdict for the defendants.

Under these instructions, to which the plaintiff excepted,—a verdict having been returned for the defendants,—the plaintiff

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now moved for a new trial, upon the grounds, that the instructions were erroneous in matter of law, and that the verdict was against the evidence.

Browne, for the plaintiff, claimed that the presiding justice erred in ruling and instructing the jury, that the agreement declared on, and the evidence given by the plaintiff, disclosed no lawful or sufficient consideration to support the agreement or action, because, —

1. The plaintiff, not being custodian of the will, was not by law obliged to communicate his knowledge as to where the will was to the defendants, *gratis*. Dig. 57, p. 359, §§ 2, 4.

2. The testator had a right to give such directions concerning his will as he saw fit; and the plaintiff, not being custodian, had a right to follow those directions, and obtain money in accordance therewith. Dig. 57, p. 257, § 5.

3. The agreement itself shows a good consideration; viz.: the allowing the will to be approved without opposition.

4. The agreement was a reasonable one.

There was no legal duress, not even constructive, disclosed either by the instrument itself, or by the evidence; and therefore the presiding justice erred in saying that the "agreement was void, as being obtained under a species of duress." If the presiding justice charged the jury, that it was necessary (in order to render a verdict for the defendants) for them to find that the will was kept back by the plaintiff in concert with his son until the agreement had been made, and by concert, means collusion, then the plaintiffs say, that a new trial ought to be granted because the verdict is against evidence.

Blake, for the defendants. The contract was void because, —

1. It was contrary to, and in fraud of public policy. "All agreements which contravene the public policy are void, whether they be in violation of law or morals, or tend to interfere with those artificial rules which are supposed by the law to be beneficial to the interests of society, or obstruct the prospective objects flowing indirectly from some positive legal injunction or prohibition." Story on Contracts, § 189. The custodian of a will is required, under a penalty, to deliver the same to the court of probate within thirty days after he has

knowledge of the testator's death. Revised Statutes, chap. 155, §§ 2, 4, p. 359..

2. There was no consideration for the promise. The custodian was obliged to give up the will without pay. The plaintiff knew who the custodian was, and controlled him; for he claimed that the testator authorized him to withhold the will if the defendants would not do as the plaintiff might think right. To refuse to give it up without pay was an attempt to revoke a will contrary to the provisions of the Revised Statutes, chap. 154, § 5, p. 357.

3. The contract was fraudulent on its face, as well as from the plaintiff's own testimony.

AMES, C. J. The agreement to pay him money, upon which the plaintiff sues, was, according to his own statement, procured by him from the defendants under a threat to destroy their father's will, which had been concealed under an arrangement to which the plaintiff was a party; the sum to be paid being the price stipulated for bringing forward the will for probate. A contract obtained by such means, and based upon such a consideration, cannot support an action. It contravenes the policy of the law, which requires the wills of deceased persons to be promptly produced by those who have the charge of, or control over them, for proof and execution; and was procured from the defendants, not only without any legal consideration, but by a species of duress, which, considering the nature and effect of a last will and testament, and the difficulty of supplying it when lost or destroyed before probate, hardly left them a choice whether they would comply with the terms imposed upon them. "After considerable negotiation," swears the plaintiff, "about what amount should be given to me to bring forward the will for probate, Esten (one of the defendants) in the mean time looking and searching for it in North Providence and Smithfield," this agreement was concluded between the parties. As a last resort then, and after exhausting every other means of obtaining what was their right, and was by the plaintiff in concert with his son illegally kept from them, the defendants yielded to this extortionate demand. It is hardly possible to conceive of a con-

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tract to pay money, so entirely without legal merit to support it.

It is no excuse to the plaintiff, legally, however it may be morally, that the testator himself, according to the plaintiff's story, concerted this scheme, and authorized the plaintiff, after the death of the former, to conceal, and even to destroy his will, as the means of procuring this or some other benefit from those who were preferred in it. The testator's power of revoking his will ceased with his life; and all agencies conferred by him upon the plaintiff or others, with regard to such or any other subject, were themselves revoked by his death. The will then became subject exclusively to the requirement of the statute:—that the custodian of it should, within thirty days after he had knowledge of the decease of the testator, deliver the same to the court of probate, or to the person named in such will as executor. Revised Statutes chap. 155, §§ 2, 4.

Neither do we deem it of the least importance to the questions involved in this case, whether the plaintiff or his son, or both, are to be regarded as having the custody of this will, in view of the statute penalties for not bringing it forward for probate within the time limited by the statute. If the son had the manual possession of the will, the father had the sole control over it; for to him only, after the testator's decease, was the son, by the express terms of the deposit, to deliver it. The avowed purpose of this arrangement was, to enable the plaintiff, by concealing and threatening to destroy the will, to extort from the defendants this or some other benefit to himself. The course pursued, both by the father and the son, was in exact accordance with this design, rather than with their legal duty. The will was kept back by both, until this agreement was obtained from the defendants, and then, and not till then, brought forward by the father for probate.

A scheme so illegal in its nature, and dangerous in its tendency, cannot be permitted to succeed. It militates with all the safeguards set by our statutes about both the making and revoking of wills; and exposes this most sacred species of instrument, when left defenceless by the death of the testator,

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to be used by the custodian or those who control him, for their own profit, in any way that they might through fraud pretend; and by perjury insist, that the testator had authorized.

This motion must be overruled, with costs, and judgment be entered upon the verdict.

DENNIS S. PERKINS, Administrator, v. WILLIAM BARSTOW.

He who indorses a note payable to another at the time it is made, is to the payee, a joint and several promisor with the maker; and as such, although but a surety as between himself and the maker, all promises and part payments made by the maker equally affect his liability under the statute of limitations, as if made by himself.

ASSUMPSIT upon a promissory note, on demand, for five hundred and sixty seven dollars and sixty-two cents, made on the 26th day of March, 1851, by one Caleb S. Pierce to Mrs. Rebecca Perkins, the plaintiff's intestate, and at the time it was made indorsed by the defendant's firm of Aldrich and Barstow. The writ was dated and served on the 4th day of September, 1860.

The defendant pleaded, in addition to the general issue, the statute of limitations. The case was tried by the court upon an agreed statement of facts, and by this it appeared, that Pierce paid on the 19th day of June, 1856, the sum of one hundred and twenty-five dollars, and, on the 22d day of July, 1856, the further sum of seventy-five dollars, on account of said note, which payments were indorsed on the note; but that both the payments and indorsements were made without the direction or knowledge of the defendant, nor did the same come to his knowledge until soon after the execution of the assignment hereinafter stated, but before the assigned property had been converted into money; nor had any new promise, either verbal or written, been made by the defendant, either individually, or for his firm, to pay said note, since the day of its date. On

6	505
11	94
12	271
6	505
16	355
6	505
18	722
6	505
20	670
6	505
24	600

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the 29th day of October, 1857, Pierce executed to the defendant a mortgage of personal property to secure him as the holder of certain promissory notes made by Pierce to him, and as an indorsee of a promissory note for the accommodation of said Pierce, the discount of which he had procured; and on the 5th day of December, 1857, executed an assignment of his property for the benefit of his creditors to the defendant and John B. Hartwell, in which a preference was given to the above debts and liabilities of the defendant, which were secured by the mortgage, and to all advances made by the defendant for the accommodation and benefit of said Pierce; but at the time of the execution and delivery of said mortgage and assignment, the defendant was not aware that the note in question was outstanding and unpaid. The property embraced in the mortgage, and which was conveyed by the assignment to the defendant and Hartwell, was not sufficient in value, at the time of the assignment, to pay and discharge all the liabilities of the defendant on account of said Pierce; but by delay in the sale of said property and advances made by the defendant on account of said Pierce, sufficient was realized to have paid and indemnified the defendant in full, including the note sued, although said note was not considered by the defendant amongst his liabilities, and he did not reserve from the assigned assets sufficient to pay the same. By the agreed statement, if, upon these facts the plaintiff was entitled to recover in the action, judgment was to be rendered for him for the amount appearing to be due upon the note; and if not, judgment was to be entered for the defendant.

Ballou & Brownell, for the plaintiff.

1. The note in suit is the joint and several note of Caleb S. Pierce and Aldrich & Barstow. *Hunt v. Adams*, 5 Mass. 358; *Hemmenway v. Stone*, 7 Ib. 58; *Chaffee v. Jones*, 19 Pick. 260; *Austin v. Boyd*, 24 Ib. 64; *Mathewson v. Sprague*, 1 R. I. 8; *Sampson v. Thornton*, 3 Met. 275; *Union Bank, &c. v. Willis*, 8 Ib. 504; *Bryant v. Eastman*, 7 Cush. 111-113.

2. A partial payment made on a note by one of several joint promisors, will take the debt out of the statute of limitations as to the co-promisors. That this is the law of England, see *Whitcomb v. Whiting*, 2 Doug. 652; s. c. 1 Smith's Lead. Cas.

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318, and cases cited. That it is the law of New England, see *Hunt v. Bridgham*, 2 Pick. 581; *Sigourney v. Drury*, 14 Ib. 387; *Turner & Salisbury v. Ross*, 1 R. I. 88-90; *Pike v. Warren et al.* 15 Me. (3 Shep.) 390; *Joslyn v. Smith*, 13 Verm. 353; *Austin v. Bostwick*, 9 Conn. 496.

3. In this case the note never was barred by the statute of limitations. The part payments by Pierce before the expiration of six years from its maturity, did not revive any liability of Aldrich & Barstow, but only continued an existing liability. *Sigourney v. Drury*, 14 Pick. 387.

Bartlett, for the defendant.

The defendant was a mere surety on this note; *Mathewson v. Sprague*, 1 R. I. 8; and as a collateral undertaker could not be affected by the partial payments made by his principal. *Gardner v. Nutting*, 5 Greenl. 140; *Bowdre v. Hampton*, 6 Richardson, 208; *Winchell v. Hicks*, 18 N. Y. (4 Smith), 538; *Hopkins v. Banks*, 7 Cow. 653; *Shelton v. Cocke*, 3 Munf. 191; *Exeter Bank v. Sullivan*, 6 N. H. 124; *Lane v. Doty*, 4 Barb. S. C. 530; Parsons on Contracts, 503.

BOSWORTH, J. This note is, upon the authorities by which this court has always been governed, a joint and several promissory note. The name of the defendant having been signed in blank on the back of the note at its inception, and the plaintiff's intestate being the payee, rendered the defendant liable as an original promisor. This undertaking was not collateral, but original and absolute. As between the other payer and himself, the defendant may be called a surety, so as to have his remedy over against the principal; but as between himself and the plaintiff, he stands in the position of a joint and several promisor. The authority cited by the defendant's counsel, (1 R. I. 8,) shows that such a signing of a note renders the person who signs it a surety, not entitled to notice of non-payment by the maker, in order to fix his liability, but liable absolutely. See, also, Story on Promissory Notes, p. 59, and cases cited.

Upon well-settled principles of the law, "evidence of an acknowledgment by one of several joint contractors, is sufficient to bind the rest; and although the party to be affected by the acknowledgment, but who was joined in a promissory note, be but a surety for the other." See 2 Starkie, p. 483, (2d edit.) and

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the cases there cited. The case of *Hunt v. Bridgham*, 2 Pick. 581, seems to be a case parallel with this in its main aspect. That was a case where the surety on a note witnessed, claimed to be discharged by lapse of time, as twenty years had elapsed after the making of the note and before action brought. The legal presumption of payment was claimed to be rebutted by several payments made by the principal debtor; one of which was a sum of fifty dollars, made and indorsed on the note within the twenty years. The court decided this to be equivalent to an express acknowledgment of an existing debt; and that as to the legal effect of these payments, the two defendants stood on the same footing; the admission of one being the admission of both. The acknowledgment of one, within six years, will take the case of an ordinary promissory note out of the statute of limitations, as to the other. These principles are decisive of this case; and judgment must be rendered for the plaintiff for the amount due on the note.

**PELEG W. GARDINER & others, Trustees, v. ALFRED H. WIL-
LARD & others.**

Where a testator, after giving a life-estate to his wife in his real and personal estate, gave a remainder in the same to trustees, in the event his wife died before the youngest of his three children became twenty-five years of age, to hold the same until his youngest child attained that age, and ordered the trustees to distribute the net income of the same amongst his children, "and if either shall have deceased without leaving children then living, to pay the same to the surviving children in equal shares; and if either shall have deceased leaving a child or children, such child or children to have the portion of the income which his or her parents would have taken," and gave a fee in the remainder, without trust to his sons, and in trust, for her sole and separate use, to his daughter, only in the event his wife died after his youngest child had attained the age of twenty-five years, *Held*; the wife having died before the youngest child attained the age of twenty-five years, and the youngest of the two surviving children having attained that age when the trustees filed their bill for instructions and partition, — that the trustees should quitclaim their title to the property to the two surviving children of the testator, free from trust as those to whom the same reverted as his next of kin and heirs at law, and could have no partition.

THIS was an amicable bill, filed by the trustees of the will of the late Hezekiah Willard, of Cranston, to obtain a construc-

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tion of said will, and for direction as to their duties under the same. The case was heard upon bill and answer, and an agreed statement; and from these it appeared, that by the will of said Hezekiah, dated in 1847 and proved in 1848, he gave his wife a life-estate in all his estate, real and personal, with power to sell the same, with the advice of the plaintiffs afterwards named as his trustees, for the purpose of better investment, and disposed of the remainder, as follows:—

“ And from and after the decease of my wife, should that event occur while either of my children are under the age of twenty-five years, I give, devise, and bequeath to the above-mentioned Peleg W. Gardiner, George B. Holmes, and Thomas Barstow, as joint tenants, all my real and personal estate then remaining, and all the real and personal estate which may have been purchased with the proceeds of any that has been sold under the power hereinbefore given, to have and to hold the same until my youngest child shall attain the age of twenty-five years, in trust, for the use and benefit of my children, as follows, namely: That the said trustees shall receive the rents, income, and profits of said real and personal estate, and after payment of all the expenses attending the care of the property, such as taxes, repairs, insurance, and the like, and including a reasonable compensation for their services, they shall pay to each of my three children, for their own use, one third part of the balance of said rents, income, and profits; and if either of my children shall have deceased without leaving children then living, the balance aforesaid shall be paid to the surviving children in equal shares; and if either shall have deceased leaving a child or children, such child or children shall have the portion of said balance his or her parents would have taken; and from and after the decease of my wife, should that event occur after the youngest of my children shall attain the age of twenty-five years, I give, devise, and bequeath to each of my two sons, their heirs and assigns forever, one third part of all my estate, real and personal, including any real and personal estate which may have been purchased with the proceeds of any that may have been sold under the power hereinbefore given to my wife, and the remaining one third part of my said estate, including

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such subsequent purchases, I give, devise, and bequeath to the said Peleg W. Gardiner, George B. Holmes, and Thomas Barstow, their heirs and assigns, as joint tenants in trust, for the following purposes, namely: that they shall hold the same for the sole and separate use of my daughter, Harriet E. Willard, during her life, and for that purpose shall receive the rents, profits, and income thereof, and at least once in each year, after deducting all necessary expenses and suitable compensation, shall pay the same to her for her sole and separate use, notwithstanding she may be married, so that she shall not sell, mortgage, change, or otherwise dispose of the same in the way of anticipation; and upon the decease of my said daughter, the said trustees shall convey and transfer the said real and personal estate, or such other as they then may hold as the proceeds of the same, to such person or persons, and for such purposes as may be directed in the last will and testament, or other instrument purporting to be the last will of my said daughter, signed in the presence of three witnesses; and in case she should leave no such will or other instrument, then they shall convey the same to the heirs at law of my said daughter, according to the laws then in force for the descent of intestate estates; and the said trustees are hereby authorized, from time to time, as they shall think it expedient, with the written consent of my said daughter, to change the investment of said trust property, and for that purpose they may convey the aforesaid real and personal estate, and reinvest the proceeds thereof in other real estate, or in bank stock, which shall be held upon the same trusts, and subject to the same disposition as above mentioned; and the said trustees are also authorized, upon the marriage of my daughter, to pay her such sum of money from the principal of said trust fund as they may think reasonable."

Martha Willard, the widow of the testator, died in 1857, leaving her three children then of the following ages: Harriet, twenty-six years old; Charles H., twenty-four years old; and Alfred H., twenty-two years old. Charles H. died unmarried, without issue, and intestate, after his mother, and in the same year Harriet had married George P. Tew, and was united with him as a party defendant to this bill. The purpose of the bill was, to

ascertain whether, under the above facts, any of the estate of the testator was to remain longer in trust, and to obtain a partition of the same between those entitled thereto.

The bill was filed December 31, 1860.

Bradley & Metcalf represented all parties.

BOSWORTH, J. By the terms of the will of Hezekiah Willard, all his estate, real and personal, was bequeathed and devised to his wife for life. In the event of his wife's dying before his youngest child should attain the age of twenty-five years, the trustees were to hold the same until his youngest child should attain that age, in trust for his three children, the income to be paid over annually, after paying expenses and compensation to the trustees, in equal shares. In the event of his wife's death after the youngest child should attain the age of twenty-five years, two thirds of the estate was to go to the testator's sons, and the remaining one third was to be held in trust for the testator's daughter.

By the statement of facts submitted and agreed to by the parties, it seems that the testator's wife died before the youngest child attained the age of twenty-five years; and the trustees took the estate in trust for the three children. In the event which authorized this trust, the trustees have the estate for a limited period, viz.: until the youngest child should attain the age of twenty-five years. The other event, upon the happening of which, they would, according to the will, have an estate in trust for the testator's daughter, did not and never can occur. The youngest child has now arrived at the age of twenty-five years. The trustees, therefore, it seems to us, had an estate which is now determined, and no other estate has vested or can vest in them. By consequence, the estate reverts and vests in the next of kin and heirs at law. One of the testator's sons has deceased without issue, and the remaining children, son and daughter of the testator, are, therefore, entitled to hold the estate as tenants in common in equal shares.

The bill of the trustees asks of the court a construction of the will as to the estates to which each of the two children are entitled, and as to what interest they are entitled to hold in trust, if any; and also asks for partition. We think, as inti-

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mated above, that the trust is determined both as to the real estate and personal estate, and they may relieve themselves of the trust by quitclaiming the real estate to the two children of the testator who are living, and by paying over to each one half of the personal estate. No partition can be made under this bill, as those who bring it have no estate whereof partition can be made.

LOWITZ & BECKER & others v. JOHN T. ALDEN, Assignee.

A master appointed under ch. 164, sect. 17, of the Rev. Stats. to settle the accounts of a removed assignee, has jurisdiction over every question which goes to the charge and discharge of the assignee as an accounting party, though involving fraud in the performance of his trust; the act relating to jury trials in equity causes having no application to summary proceedings in equity, upon petition.

EXCEPTIONS to the report of a master, appointed, under the provisions of ch. 164, sect. 17 of the Revised Statutes, for the settlement of the accounts of an assignee under a voluntary assignment, removed by order of court.

Amongst other exceptions to the report, one taken was, in substance, that the master had exceeded his jurisdiction, by finding that the inventory produced to him by the assignee of the goods assigned, and which was provided for in the assignment, was not that originally taken, but that many valuable goods set down in the latter were omitted in the former; and had held the assignee to account upon the basis of that originally taken, as he found its amount to be, upon the proof. The ground for the exception was stated to be, that this was substantially a finding that the assignee had committed a fraud; whereas, according to the course of equity in this state, this could only be done upon a bill filed, in the trial of which the assignee might have the benefit of his answer, and if he so elected, all might also have questions of fact found by a jury.

Payne, for the exceptions.

Wm. H. Potter, for the report.

AMES, C. J. The statute (Rev. Stats. ch. 164, §§ 12 to 17, inclusive,) has authorized this court, upon the petition of creditors, to require an assignee, under a voluntary assignment for their benefit, to file an inventory of the assigned property, and to give bond with surety for the faithful performance of his trust; and under certain circumstances to remove the assignee, compelling him to account according to the course of equity, and to appoint a suitable person to receive, collect, take, and recover all the estate, effects, and credits conveyed by the deed of assignment, and to dispose of the same as the deed directs. That the remedy might be speedy enough to answer the purpose for which it was designed, this power is, in vacation of the court, to be exercised by a single justice thereof.

The very design in giving this "summary proceeding," as it is expressly called in the 17th section of the statute, was to avoid the incumbrance and delay of plea, answer, and replication. *Burlingame & Co. v. Emerson*, 5 R. I. Rep. 62. The assignee is sufficiently privileged as to proof, by being allowed by another statute, although interested and a party, to testify in the proceeding generally as a witness; and the statute in relation to jury trials in equity causes has no application to it; since, by its express terms, it is confined to such causes as must be commenced by bill, and then, is the right of a party, only when demanded in writing within ten days after replication filed; both which provisions exclude such a case as this.

The court or justice removing an assignee is to make provision for the settlement of the assignee's accounts, "according to the course of equity; that is, by the appointment of a master, before whom both the creditors and assignee may be heard; and every question, though involving fraud on the part of the assignee, which goes to charge or discharge him as an accounting party, is within the jurisdiction of the master, and must be, to attain the purpose for which he is appointed.

This exception is therefore overruled.

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WILLIAM A. HOWARD v. THE CITY OF PROVIDENCE.

What a town or city has paid neighboring proprietors as damages for their land taken and injured by the laying through it of a street, and in compromise of their claims for such damages pending an appeal, cannot be given in evidence to prove the damages of another like claimant and appellant.

The competency of a person to give his opinion under oath as an expert, so that upon the preliminary examination he appears to have any pretensions to speak as such, rests very much in the discretion of the judge trying the cause.

Considerations proper to be taken into account by a jury in estimating the damages of one, part of whose land has been taken for a street under the act of January session, 1854, entitled, "An act in relation to the laying out, enlarging, straightening, or otherwise altering streets in the city of Providence."

APPEAL from the report of commissioners awarding damages for the laying out of Washington Street, in the city of Providence, over the appellant's land, under the act in "relation to the laying out, &c. of streets in the City of Providence," passed at the January session of the general assembly, 1854. The appeal was tried at this term before the chief justice with a jury, and at the trial the appellant, in order to prove the amount of damage done to him by the taking of his land, offered to prove by Dennis Sawyer and Caleb Burrows, that the city of Providence had paid to the Rawson Fountain Society and to the said Burrows, in compromise of their appeals from awards of damages for lands taken for said street adjoining the appellant's, certain sums of money, which proof, upon objection, was ruled out by the presiding judge. The judge also admitted, notwithstanding the objection of the appellant, Walter W. Updike, as a witness in behalf of the City of Providence, to give his opinion, as an expert, as to the damage done to the appellant, by the laying out of Washington Street through his land, and as to the relative value of said land before and after the laying out of said street; it appearing, from a preliminary examination of the witness, that he was a dealer in real estate for himself and others, and had been acquainted with the value of real estate about Providence for the last ten years; that he had been somewhat familiar with the estate of the appellant, having owned real estate near it; that

he had not advertised himself as a real estate broker, but practised as a lawyer, but that he had bought and acted for others in the sale of real estate, as a part of his business, in thirty or forty instances.

The judge also charged the jury, in substance, that in estimating the damages of the appellant, they were to estimate the value of his land taken, and any substantial damage done to the remainder of his land, not taken by the making of the street; that they were to consider and estimate, on the other hand, the substantial benefits, if any, conferred upon the appellant by the opening of the street through his land, giving him fronts on the street for what was back land, and raising its value for building purposes, if they found, from its position and character that its chief improvable value was in using it for such purposes; that if the benefits of a substantial character equalled or overbalanced the injury done by taking a portion of the land, and by the shape in which the making of the street left the land not taken, their verdict must be against the appellant; but if the damage by the making of the street to the appellant's land as above, exceeded such benefits, they must assess the balance in his favor against the city; and that, in any comparison which they might make between the value of the appellant's land, with or without the street through it, they were to consider its capability of improvement by the appellant, by the laying out of streets by him, as well as the chance of streets being laid through said land by the public more advantageous to him than the present street; always taking into consideration, however, in such a comparison, that the street actually laid out was a public street, and was made and supported by the public, and the improbability that the public would lay out a street with sole regard to any one individual's interest; its duty being so to lay streets as to combine the greatest public benefit with the least private injury.

The appellant having duly excepted to the above rulings and charge, and the verdict of the jury having found that he had sustained no damage by the laying out of Washington Street through his land, he now moved for a new trial, on the ground that the presiding judge had erred in matter of law in so ruling and charging.

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W. H. Potter, for the appellant.

Clarke, City Solicitor, and *T. A. Jenckes*, for the City of Providence.

BOSWORTH, J. The ruling of the court in this case, upon the evidence offered, we think was correct. What the city paid other parties in compromise of suits pending on appeal for land damages, although the lands might be similarly situated with lands of the plaintiff's taken by the city, was certainly not evidence of the market value of the land, or of any substantial damage suffered by the plaintiff. Upon grounds of public policy, offers made in compromise of suits, pending litigation, are not to be used in evidence against the party making them. 1 Greenleaf, § 192. We do not see that such evidence ought to be any guide to the jury in estimating damages. When a party buys his peace, or compromises a pending suit, many considerations may influence him; the trouble, vexation, and cost of a lawsuit, payment of counsel, time expended in attending litigation, and other matters, may induce him, for the avoiding of trouble, to pay in compromise far more than the value of the thing in controversy.

The rule for the admission of experts as witnesses, places the question of qualification very much in the discretion of the judge presiding at the trial. He makes a preliminary examination to ascertain whether the witness is an expert. If he finds him so, he properly admits him; and the jury judge of the weight of his testimony. The witness Updike, in this case, seems, by his preliminary examination, to have had experience enough in the buying and selling of lands for himself and others in the city, to render him an expert upon the question of value of land, if any one could be so. The judge in his discretion admitted his testimony to go to the jury; and they, hearing the evidence of his means of knowledge as well as his opinion of the value of the land, no doubt gave to his opinion just so much consideration as they deemed it entitled to. In this we see no error.

As to the charge given to the jury, we do not see but that it was in accordance with the law; and as no particular error is pointed out in the exceptions, and we can find none ourselves, we must overrule the grounds presented for a new trial. The petition for a new trial is therefore dismissed.

NICHOLAS G. HOXSIE *vs.* THE PROVIDENCE MUTUAL FIRE
INSURANCE COMPANY.

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Where the directors of a mutual fire insurance company are empowered by charter "to determine the sum to be insured upon any building, provided it do not exceed three fourths of the value thereof," but are, by the general powers vested in them, to determine the value of the building, the company, when sued for a loss under a policy, is estopped from objecting that the sum insured by the directors exceeded the prescribed limit of value; there having been no fraud or misrepresentation as to value on the part of the insured.

A plea alleging such excess of insurance over value in full answer to a count upon the policy, is bad upon demurrer, inasmuch as it goes only to such excess, — and thus sets up but a partial defence to the count.

A fire policy taken out from a mutual company by a mortgagor of a house upon his interest in it, though assigned with the assent of the company to the mortgagee, is avoided by a quitclaim deed by the mortgagor of all his interest in the land to the mortgagee, executed after the assignment and before the loss, the policy never having been ratified and confirmed by the company — and the charter providing, that upon alienation of a house insured "by sale or otherwise," the policy shall be *ipso facto* void, unless ratified and confirmed to the alienee.

Such policy too, upon a house described therein as "occupied for a dwelling-house," "the basement being of stone and wood," becomes void in the hands of the mortgagee by the use and occupation of the basement of the house, after the assignment and before the loss, as a joiner's shop, although such change of use was unknown to the mortgagee; the charter expressly providing, that "no policy shall extend or be construed to extend" to such and other specified risks, "unless the same are expressly mentioned in the policy, and a proportional premium and deposit paid."

COVENANT broken, to recover losses upon two policies of fire insurance issued by the defendants, the one bearing date October 26, 1859, for \$1500, effected by the plaintiff on a house on his farm, in the town of West Greenwich, occupied as a dwelling-house; the other, bearing date November 24th, 1853, and effected by one Benjamin R. Hoxsie on a house on Noose-neck Hill, in the same town, and "occupied as a dwelling-house." The latter policy recited that the property insured was under mortgage to the plaintiff; and the policy was, on the day of its date, assigned to the plaintiff — the transfer being recorded in the office of the defendants.

The declaration contained two counts: the first, upon the policy effected by the plaintiff, and the last upon the policy effected by Benjamin R. Hoxsie, and by him assigned to the plaintiff.

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The second plea to the first count and the last plea to the second count, alleged that the policies were respectively made for a much greater sum of money than three fourths of the actual value of said insured premises, in said counts mentioned, contrary to the form of the act of incorporation of said company; and by reason thereof were void. The first plea to the second count, in substance, alleged, that after the assignment of the policy to the plaintiff, and before the loss by fire, to wit, on the day of October, 1859, the said Benjamin R. Hoxsie, by his deed of that date, for valuable consideration, released and quitclaimed to the plaintiff and his heirs all his right, title, and interest in the insured premises. To these pleas the plaintiff demurred generally, and the defendants joined in the demurrer. The second plea to the second count alleged, in substance, that after the making and assignment of the policy covenanted on, and before the loss, a certain part of the house insured thereby, "to wit, the basement thereof, was used and occupied as and for a joiner's shop, whereby the same became and was exposed to greater risk and hazard than the same was in at the time the same was insured," by reason whereof said policy became, and was null and void, &c. To this plea the plaintiff replied, in substance, that the house insured was not, after the making and assignment of the policy and before the loss, used and occupied as and for a joiner's shop, *with the knowledge of the plaintiff*, and thereby exposed to greater risk, &c. and concluded to the country. To this replication the defendants demurred generally, and the plaintiff joined in the demurrer, specially assigning for cause that it involved a negative pregnant, without stating how, and tendered an immaterial issue.

The defendants were a mutual insurance company, and the sections of their charter, referred to in the pleadings and arguments, and in the opinion of the court, were as follows:—

"SEC. 2. *And be it further enacted*, That all and every person and persons who now are, or who shall at any time hereafter become insured in or with said company, and also their respective heirs, executors, administrators, and assigns, being allowed to continue as persons insuring in said company, as

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hereinafter mentioned and provided, shall be deemed and taken as members thereof, for and during the term specified in his, her, or their respective policies and no longer, and shall at all times be concluded and bound by the provisions of this act.

"Sec. 3. *And be it further enacted*, That the direction and management of said company, and all the funds and affairs thereof, from time to time, shall be intrusted with and committed to nine of the members thereof, who shall be styled the '*Directors of the Providence Mutual Fire Insurance Company*,' five of whom shall be a quorum, and all questions shall be determined by a majority of those present at any legal meeting.

"Sec. 8. *And be it further enacted*, That the board of directors shall superintend the concerns of the company, and shall have the management and direction of all the funds, matters, and things, not otherwise provided for by the company. They shall have power from time to time to appoint a treasurer, secretary, clerk or book-keeper, surveyors, messengers, and agents, and allow them such compensation for their services, and take such securities from them, as they shall think necessary, for the faithful discharge of their respective trusts; and also to remove all or any of them, as they shall see cause: to determine the sum to be insured upon any building, provided it shall not exceed three fourths (except on stone or brick buildings, upon which four fifths of the value may be insured) of the value thereof: to direct and order the making and delivering all policies of insurance, and to purchase and provide books and all other things needful for the office of said company, and for carrying on the affairs thereof: to fix the premium or sum to be deposited for insurance on any building or buildings insured by said company: to reward such person or persons as shall distinguish themselves by extraordinary exertions or services in extinguishing fires, not exceeding ten dollars to any individual; and to draw upon the treasurer for the payment of all losses and expenses incurred in the transactions of the concerns of said company. They shall and may from time to time, at their monthly meetings, choose three trustees, out of their own number, who shall continue in their said office during the pleasure of the directors, and the said trustees, or any two of them, shall

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execute in their own name, such policies of insurance as are ordered by the directors; and the said trustees shall report all their proceedings and doings, by virtue of this act, to the directors at the several monthly meetings, and the same, together with the proceedings and doings of the directors, shall be entered in books of minutes, to be kept for that purpose; and any director may enter therein his dissent from, or approbation of the said proceedings, assigning his reasons for the same.

"SEC. 11. *And be it further enacted*, That each and every person effecting insurance in or with said company, shall have one or more policy or policies for the same, under the hand of the trustees or two of them at least; all which insurances shall be deemed good and valid, from the time that the charges of insuring and the deposit money shall be paid or secured as is hereinafter directed.

"SEC. 14. *And be it further enacted*, That no insurance on any building or buildings within this state, shall be good and valid, unless the insured has a good and perfect title in fee-simple, unincumbered, to the building or buildings, and the land covered by the same, or unless the true title of the insured and the incumbrances on the premises be expressed in the policy.

"SEC. 20. *And be it further enacted*, That all buildings insured by this company within the state, and all the insurer's right, title, and interest, claims and demands, in and to the lots whereon the same are situate, shall become pledged to this company, and the said company shall have a lien thereon against the insured, during the continuance of his, her, or their policies; and if any person or persons insured as aforesaid, their heirs, executors, administrators, or assigns, shall for the space of three months, neglect or refuse to pay the whole, or such part of the demands against him, her, or them, as shall be ordered by the board of directors, and as herein before provided, then, and in that case, the said directors shall have full power and lawful authority to recover the same in the manner following, viz.: A copy of the claim or demand shall be annexed to the original writ, which writ shall issue at least six days before the sitting of the court to which it is made returnable, from the office of the clerk of either of the courts of common pleas, or of

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the supreme judicial court, in either of the counties of this state; and the proper officer to whom such writ shall be delivered, shall thereon attach the real estate of the defendants pledged in his, her, or their policies of insurance, equal in amount to the damages laid in said writ. And the said writ shall be returned to the same clerk's office six days before the sitting of the court, and be entered on the docket on the second day of the term thereof; on which said day the defendant or defendants may file his or their answer thereto; and at the same term of said court, final judgment shall be rendered in said case, and execution shall issue thereon according to law, towards satisfying such execution, unless the same shall be otherwise satisfied.

"SEC. 21. *And be it further enacted*, That the directors shall settle and pay losses at the end of ninety days from the time that the same shall have been duly notified as aforesaid, unless they shall judge it proper within that time, to rebuild the house or houses destroyed, or repair the damages sustained, which they are hereby empowered to do, in convenient time: *Provided*, that they do not lay out and expend in such building or repairs, more than the sum insured upon the house or houses, and the buildings injured or demolished; but no allowance is to be made for gilding, history or landscape painting, stucco or carving, nor are the same to be replaced, if destroyed by fire.

"SEC. 22. *And be it further enacted*, That whenever the property of any person or persons, in any house or building insured in said company shall cease and determine, it shall and may be lawful for the person or persons insured, their heirs, executors, administrators, and assigns, to receive such deposits as may be due to them from said company.

"SEC. 23. *And be it further enacted*, That if any alteration should be made in any houses or buildings, by the act of the proprietors of them after they are insured in the office of said company, whereby they may be exposed to greater risk or hazard than they were in at the time they were insured, then and in every such case, the insurance made upon such houses or buildings shall be void, unless an additional premium and deposit shall, after such alterations, be settled and paid by agreement with the directors.

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" SEC. 28. *And be it further enacted,* That no sugar-house, bake-house, distill-house, cooper's or joiner's shop, or other house or shop wherein any of the hazardous trades or businesses following are carried on, viz.: chemists, ship-chandlers, stable-keepers, malt-driers, oil, or colormen; or any which are used as stores for the following hazardous goods, viz.: hemp, flax, tallow, pitch, tar, turpentine, rosin, gunpowder, shingles, hay, straw, fodder of all kinds, and grain unthreshed, shall be insured in said company, but on such terms only as shall or may be specially agreed upon by the directors; and no policy shall extend or be construed to extend to any of the houses, buildings, or risks specified in this section, unless the same is expressly mentioned in the policy, and a proportional premium and deposit paid; nor shall any policy extend or be construed to extend to any house or building in which more than twenty-eight pounds of gunpowder shall have been for twenty-four hours next before the time that the same house or building was burnt.

" SEC. 29. *And be it further enacted,* That when any house or other building shall be alienated by sale or otherwise, the policy shall thereupon be ipso facto void, and be surrendered to the directors of said company to be cancelled, and upon such surrender the insured shall be entitled to receive his, her, or their deposit notes, upon the payment of his, her, or their proportion of all losses and expenses, which had accrued prior to such surrender; *Provided, however,* That the grantee or alienee having the policy assigned to him may have the same ratified and confirmed to him, her, or them, for his, her, or their own proper use and benefit, upon application to the board of directors, and with their consent, within thirty days next after such alienation, on their giving proper security to the satisfaction of said board, for such portion of the premium note as shall remain unpaid; and by such ratification and confirmation, the parties causing the same, shall be entitled to all the rights and privileges, and subject to all the responsibilities to which the original insured was entitled or subject under this act.

" SEC. 31. *And be it further enacted,* That it shall be the duty of the secretary or clerk of the board of directors to make and keep a fair record of all policies of insurance and transfers

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thereof, and all and singular the votes, orders, resolutions, and proceedings of said board."

Eames, for the plaintiff.

The second plea to the first count and the last plea to the second count, are insufficient in law to preclude a recovery on the counts, because they do not aver that the policies of insurance were made for more than three fourths of the actual value of the premises thereby insured, by the misrepresentations, or by the false and fraudulent representations of the assured; or that the defendants were induced to make, or the assured had procured the making, of said policy, for more than three fourths of the value of said premises, by any such misrepresentations, or false or fraudulent representations. *Borden v. Hingham Mut. F. Ins. Co.* 18 Pick. 525; *Fuller v. Boston Mut. F. Ins. Co.* 4 Met. 206; *Holmes et als. v. Charlestown M. F. Ins. Co.* 10 Met. 215; *Phillips v. Merchant's M. F. Ins. Co.* 10 Cush. 350; *Hersey v. Merrimack M. F. Ins. Co.* 7 Foster, 153; *Williams v. New England M. F. Ins. Co.* 31 Maine, 226; *Angell on Fire and Life Ins.* p. 226, § 190.

The defendants' third plea is bad. The rights of the plaintiff cannot be defeated or impaired by the acts of Benj. R. Hoxsie, subsequent to the assignment by him to the plaintiff, with the consent of the defendants, of the policy mentioned in the second count of the declaration. The mortgage was itself an alienation by sale or otherwise. *McCulloch v. Ind. M. F. Ins. Co.* 8 Blackf. 54; *Duray v. Ins. Co.* 4 Zabriskie, 198; *Angell on Fire and Life Ins.* p. 240, § 205. The assignment, with the consent of defendants, was in the nature of a new covenant with the assignee of the policy. *Angell on Fire and Life Ins.* p. 104, § 61; 2 Am. Lead. Cases, 146; *Mowry v. Todd*, 12 Mass. 281; *Wilson v. Hill*, 3 Met. 69; *Kingsley et als. v. New England Mut. F. Ins. Co.* 8 Cush. 400; *Phillips v. Merrimack Ins. Co.* 10 Ib. 353; *Warren v. Wheeler*, 8 Shepl. 484; *Clark v. Thompson*, 2 R. I. 148; *Brown v. Roger Williams Ins. Co.* 2 Ames, 399. The acts of a mortgagor in such case cannot affect the policy. *Traders' Ins. Co. v. Roberts*, 9 Wend. 404; *Roberts v. Traders' Ins. Co.* 17 Wend. 638; *Tillou v. Kingston M. F. Ins. Co.* 7 Barb. 573;

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S. C. 1 Seld. 405; *Boynton v. Clinton & Essex M. F. Ins. Co.* 16 Barb. 256; *Conner v. Mut. Ins. Co. of Albany*, 1 Comst. 290; *Allen v. Hudson River Mut. Ins. Co.* 19 Barb. 447; *Charleston Ins. & Trust Co., ads. Neva*, 2 McMullan, 248; *Birdsey v. City Fire Ins. Co.* 26 Conn. 171; *Pollard v. Somerset M. F. Ins. Co.* 42 Maine, 224; 2 Gray, 216; 4 Zabriskie, 171. The relation between the plaintiff and the defendants was that of insurer and insured. In legal effect, the transaction was an insurance to the plaintiff of his interest as mortgagee. *Charleston Ins. & Trust Co., ads. Neva*, 2 McMullan, 248; *Allen v. Hudson River M. Ins. Co.* 19 Barb. 446.

The quitclaim deed from Benjamin R. Hoxsie to the plaintiff was not an alienation of the insured premises, within the meaning of sect. 29 of the charter. The alienation contemplated by that section is an alienation to a third party. *Tillou v. Kingston M. F. Ins. Co.* 7 Barb. 574; *Wilson v. Genesee M. F. Ins. Co.* 16 lb. 511; Angell on Fire and Life Ins. p. 267, § 200 a, (2d edition.)

The replication to the second plea to the second count is at least good enough for the plea. The use of the insured building as a joiner's shop, in the sense of sect. 28 of the charter, is a use by the authority, express or implied, of the assured. *Loud et al. v. Citizens' Mut. Fire Ins. Co.* 2 Gray, 222; *Farmers & Mechanics' Ins. Co. v. Simmons et als.* 6 Casey, (30 Penn.) 301, and cases cited; *Dobson v. Sotheby et al.* 1 Moody & Malkin, 90; S. C. 22 Eng. C. L. Reports, 260; *Shaw v. Robberds*, 6 Ad. & Ell. 103; S. C. 33 Eng. C. L. Reports, 16. The averment of a use by the authority, express or implied, of the insured, is, therefore, material, and consequently the traverse of such averment does not tender an immaterial issue. The replication traverses the plea in the language of the plea, and if it involves a negative pregnant, or tenders an immaterial issue, the fault is in the plea and not in the replication.

James Tillinghast, for the defendants.

The second and last pleas (one to each count in the declaration upon different policies) raise the same question, viz.: that the policies are void for having been made for more than two thirds of the value of the property insured, contrary to the pro-

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visions of the defendants' act of incorporation. See sect. 8 of charter annexed to policies.

A corporation can make no contract prohibited by its charter. All such contracts are void and not binding upon the corporation, and cannot be enforced against it. *Angell & Ames on Corporations*, 256 *et seq.*; see *Hale v. Mechanics' M. F. Ins. Co.* 6 Gray, 173. The alienation of the property as set out in the third plea to the second count, avoided the policy declared on in that count. See sect. 29 of charter. This would be so on common-law principles, aside from the above section of the charter. In fact, that section in declaring the policy void on alienation, is only in affirmance of what would be the effect at law without it, and provides how the policy, after being so avoided, may be revived. *Lynch v. Dalzell*, 3 Brown, P. Ca. 497; *Sadlers' Co. v. Badcock*, 2 Atkins, 554; *Wilson v. Trumbull M. F. Ins. Co.* 19 Penn. (7 Harris,) 372. The fact that this policy had, previously to such alienation by the assured, been assigned to the plaintiff as mortgagee, with the assent of the company, does not avoid the forfeiture of the policy by such alienation. It was still the interest of the original assured that was covered by the policy, and the plaintiff took the transfer of it, subject to its being defeated in his hands by any act of the assured which would have avoided it had it not been assigned. *Carpenter v. Wash. Ins. Co.* 16 Peters, 495; *Macomber v. Cambridge M. F. Ins. Co.* 8 Cush. 133; *Grosvenor v. Atlantic F. Ins. Co.* 3 Smith, (17 N. Y.) 391; *Buffalo Steam Engine Co. v. Sun M. F. Ins. Co.* Ib. 401; *Birdsey v. City Fire Ins. Co.* 26 Conn. 165; *State M. F. Ins. Co. v. Roberts*, 31 Penn. St. Rep. 438; *Adams et als. v. Rockingham M. F. Ins. Co.* 29 Maine, 292. Nor does the fact that this alienation was by a conveyance of the equity of redemption to the plaintiff, who already held a mortgage of the property, at all change the application of the principal. *Macomber v. Cambridge M. F. Ins. Co.* 8 Cush. 133, a *parallel case*. See *Murdock v. Chenango County M. F. Ins. Co.* 2 Comst. 210; *Finley v. Lycoming County M. F. Ins. Co.* 30 Penn. St. Rep. 311; *Howard v. Albany Ins. Co.* 3 Denio, 301; *Tillou v. Kingston M. Ins. Co.* 1 Selden, 405.

But were this not so, this action in the name of Nicholas G.

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Hoxsie cannot be maintained upon the policy as set out in the second count of this declaration. The action must be, if at all, in the name of the assured, as at common law; as it does not come within the 29th section of defendants' act of incorporation, which only applies to alienations, *i. e.* conveyances of the title, and not to mortgages; and there is no provision, therefore, for mortgagees becoming members of the company. *Folsom v. Belknap County M. F. Ins. Co.* 30 N. Hamp. 231; *Conover v. M. F. Ins. Co. of Albany*, 3 Denio, 254; *s. o.* in Court of Appeals, 1 Comstock, 290; *Lazarus v. Ins. Co.* 5 Pick. 81; Angell on Fire and Life Ins. § 211 and note, and cases cited.

There is no averment in this count of the declaration, that the plaintiff ever did (if he could, under their charter) become a member by complying with the requisitions of said section 29, nor no sufficient averment of plaintiff's interest in the property insured. *Rollins v. Columbia F. Ins. Co.* 25 N. Hamp. 200; *Jessal v. Williamsburg Ins. Co.* 3 Hill, (N. Y.) 88; *Munn v. Herkimer Ins. Co.* 4 Ib. 187; *Bayles v. Hillsborough Ins. Co.* 3 Dutcher, 163; *Pollard v. Somerset M. F. Ins. Co.* 42 Maine, 221.

The defendants' special demurrer to the plaintiff's replication to the fourth plea is well taken. The replication is bad, as involving a negative pregnant, or tendering an immaterial issue; for the knowledge of the plaintiff of the change in the use of the building by which the risk was increased, (under section 28 of the defendants' charter,) is entirely immaterial and not traversable,—particularly as the plaintiff was merely a mortgagee. *Mead v. Northwestern Ins. Co.* 3 Selden, 530; *Glen v. Lewis*, 20 Eng. Law & Eq. 364. This section of the charter is a part of the policy, and amounts to a warranty by the assured, or a condition of the contract, a breach of which avoids the policy; and the policy is equally avoided, though a part only of the premises has been so used. The contract of insurance is entire. *Lee v. Howard F. Ins. Co.* 3 Gray, 583; *Harris v. Columbian Ins. Co.* 4 Ohio, (N. S.) 285; *Wall v. East River M. F. Ins. Co.* 3 Selden, 370; *Richards v. Protection Ins. Co.* 30 Maine, (17 Shep.) 273.

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AMES, C. J. The second plea to the first count, and the last plea to the second count of this declaration, are clearly bad. It is true, as argued for the defendants, that the officers of a corporation cannot exceed their charter powers; and that in a mutual company like this, of which the assured are members, they may fairly be presumed actually to know, as well as constructively to have notice of, all limitations of these powers. The language of the 8th section of the charter restricting the directors of the company in the relative amount which they may insure upon buildings is, certainly, very strong and explicit. "They shall have power to determine the sum to be insured upon any building, provided it shall not exceed three fourths (except on stone or brick buildings, upon which four fifths of the value may be insured) of the value thereof;" but then, by this very section as well as by the third, they have the general management and direction of the funds and affairs of the company, and the determination of all questions relating thereto, as well as the special power to fix the premium or sum to be deposited for insurance, which, of course, is to be proportioned to the amount insured. They, and they alone, on the part of the company, have the power to determine the value, three fourths or four fifths of which, as the case may be, they are at liberty to insure; and when without fraud or misrepresentation on the part of the assured, they have agreed with him as to this value, and have taken his money upon the basis of this agreement, the company ought to be bound by their action, as the assured must be by his. The value of a building must necessarily be a mere matter of estimate or opinion, incapable of mathematical exactitude, and depending not only upon the manner and consequent cost of construction, but upon the thousand and one circumstances which from time to time sway the market here, even in real estate. Unless, then, this is to be considered as concluded by the policy, where a mutual estimate has been fairly arrived at by both parties to it, it might lead, especially at a distance of time, (and the policies of this company run for seven years,) not only to dispute and litigation, but possibly to great injustice. We say "possibly," because in practice we hardly think that an insurance company would

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reap much advantage from an appeal from the judgment of their own directors, in such a matter, to that of a jury. The rule adopted by the courts in the cases upon this point noted in the plaintiff's brief, is quite satisfactory to us, as a rule of practical justice, and we apply it to this case.

But waiving this, there is another fatal objection to this plea. Grant that the estimate of value by the directors, in a fair case, is not binding upon the company, does it follow that the policy is *void* because the agents of the company are not as wise or as wary in their duty as they ought to be? Full justice would be done to the *company*, at least, by correcting the error of their directors, and abating the excess of insurance over the limit of proportional value, upon the adjustment of the loss. They might well afford to pay the sum which their agents had a right to insure, especially if they retained the greater premium proportioned to what they did insure. In this view of the matter, which, in the absence of all fraud or misrepresentation on the part of the insured, is the one we should certainly take, if we were disposed to depart in such a case from the sum fixed in the policy, the plea, which professes in its commencement to answer the whole cause of action declared upon in the count, would answer it only in part; that is, as to the excess insured over the charter limit of value; and so, would be insufficient upon general demurrer. *Earl of Manchester v. Vale*, 1 Saund. 28, and note 3.

The first plea to the second count, demurred to by the plaintiff, and the replication to the second plea to the same count, demurred to by the defendants, present questions turning upon the same general principles; and as our determination of these will dispose of the cause of action covered by the count, we deem it unnecessary to consider the further question presented by the defendants, whether the action upon the policy originally issued to Benjamin R. Hoxsie, and by him assigned to his mortgagee, should not have been brought in the name of the former.

The first plea to the second count, in substance, alleges, that after the execution of the policy and its assignment to the plaintiff as mortgagee, and before the loss, the mortgagor, in whose name

the policy was taken out, quitclaimed all his interest in the house insured to the plaintiff, leaving himself, the party originally insured, no interest, at the time of the loss, in the subject of insurance. The plaintiff's demurrer admits this, and the question is, what effect had this deed of quitclaim upon the policy?

It is as old as the law of fire insurance in England, that a fire policy, being a personal contract of indemnity between the insurer and insured by which the interest of the latter in the subject of insurance is alone covered, does not pass, upon alienation of the subject, as incident thereto, nor, without the consent of the insurer, upon an alienation of the subject, by an assignment of the policy to the alienee. From the very nature of such a contract, it follows, in such case, that upon the determination, before loss, of the interest of the insured, the policy becomes a nullity. *Lynch v. Dalzell*, 3 Brown's P. C. 497; *Sadler's Co. v. Badcock*, 2 Atk. 554; *Wilson v. Hill*, 3 Metc. 66, 68, *Shaw, C. J.*; *Carpenter v. Providence Washington Ins. Co.* 16 Pet. 495, 503. In modern policies this is not ordinarily left to inference; and in this, by the 29th section of the charter of the company, made, by the 2d section, with the other charter provisions, as well as by reference in the policy, a part thereof, and conclusively binding upon all policy holders, it is expressly provided, that "when any house or other building shall be alienated by sale or otherwise, the policy shall thereupon be *ipso facto* void," unless, indeed, "the grantee or alienee, having the policy assigned to him, shall have the same ratified and confirmed to him" for his own benefit, upon application to the board of directors, and with their consent, within thirty days next after such alienation, on his giving security to the satisfaction of the board for such portion of the premium note as shall remain unpaid; by which ratification and confirmation, the parties causing the same shall be entitled to all the rights and privileges, and be subject to all the responsibilities, to which the original insured was entitled or subject under the charter.

Is there anything in this case which relieves it from the unratified alienation by the assured of all his interest in the subject of insurance, set up in the plea? It is said, that

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upon the same day that the policy was taken out by Benjamin R. Hoxsie, it was assigned, with the consent of the company, to the plaintiff, whose mortgage on the house insured was noticed in the policy; and that, by virtue of this consent, the plaintiff, to the extent of his mortgage, became an original insurer, incapable of being affected by the subsequent alienation to him of the interest of the person originally insured.

We do not apprehend that the mortgage, which existed prior to the policy, was any *alienation* of the subject of insurance whatever; and certainly not, in the sense of the 29th section of the charter of this company, which contemplates only an alienation made after the effecting of the policy. It follows, that no such application to the board of directors, or consent given by them, could have been made upon the issuing of this policy, such as are contemplated by this section; nor is there anything in these pleadings to show that anything ever was done by this company or its agents, by which the plaintiff under this policy subjected himself to the responsibilities, or entitled himself to the rights, of the original insured. It was necessary to the validity of the policy, under the 14th section of the charter, that the incumbrance of the plaintiff, by way of mortgage upon the house insured, should be expressed in the policy; and this having been done, and the insured having assigned the policy to the plaintiff as mortgagee in farther security for his debt, all that was done by the company was to record this assignment, with the policy, upon their books. No doubt this would operate as notice to them of the assignment of the policy, and be viewed as an implied assent on their part thereto; but it left wholly unaffected the questions who was the insurer, and whose interest was insured. The insurance was, notwithstanding all this, the insurance of the mortgagor, upon his interest in the subject, assigned to the plaintiff by way of security for his mortgage debt, and merely collateral thereto. As such, in case of loss, it was to be collected, held, and applied, for the benefit of the mortgagee, to the extent of his mortgage debt, but if that were paid, or beyond that, to the benefit of the mortgagor, the insured. *Carpenter v. The Providence Washington Ins. Co.* 16 Pet. 495, 501, 502.

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As a policy of fire insurance is not a negotiable instrument, and gives to the assured only a contingent and conditional right to recover in case of loss, it would seem to follow, that when it was assigned, though with the consent of the insurer, merely as the policy of the assured and as collateral security for his debt, it would be defeated by breach of any of its conditions, before loss, suffered or committed with or without the knowledge or complicity of the assignee. If a mortgagee desires to avoid responsibility, to this extent, for the acts or defaults of the mortgagor, it is perfectly competent for him to take out insurance upon his own interest as mortgagee, and to hold it unaffected by the conduct of another. It seems to us quite unnecessary, in search of some general equity, to break down the contracts of parties perfectly capable of making them; and such, in application to this subject, is the doctrine of the present day by the decided weight of authority. *Ibid.*; and see cases cited to this point by the counsel for the defendants.

Nor is this result at all affected, in the view of the courts of Massachusetts, by their notion, that in case of assignments of fire policies similar to this, the action to recover the loss may, upon the ground of a new contract with him, be brought in the name of the assignee. This new promise to pay is still construed by them to embrace, and be limited by, the conditions of the policy, and to be defeated with it, by any breach of those conditions by the assignor, though subsequent to the assignment. *Macomber v. Cambridge Mutual Fire Ins. Co.* 8 Cush. 133; *Fogg & another v. Middlesex Mutual Fire Ins. Co.* 10 Ib. 337; *Hale v. Mechanics' Mutual Fire Ins. Co.* 6 Gray, 169.

It is unnecessary, however, to decide in this case, what would have been the effect upon the policy of an alienation of the interest of the mortgagor to a stranger, made without the consent of the defendants; the policy having been previously assigned, with their consent, to the plaintiff, his mortgagee. The plea alleges, that the plaintiff himself received the quitclaim of all the interest of the assured in the subject of insurance. *He* cannot, therefore, complain that he is subjected to the breach of a condition of this policy, in which he admits by his demurrer that he participated. If he chose to foreclose his mortgage, and

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terminate the insured interest of the mortgagor without obtaining, in his favor, as alienee, the company's ratification of the policy, there is no pretence, either at law or in equity, for holding them to a contract, an express condition of which he himself has broken. *Macomber v. Cambridge Mutual Fire Ins. Co.*, *supra*.

This plea must, therefore, be sustained, as a good bar to the cause of action declared upon in the second count in the declaration.

The replication to the second plea to this count remains to be considered. The policy, as set out in the count, describes the house insured, as "occupied for a dwelling-house," "the basement being of wood and stone." The plea alleges, that this basement, after the assignment of the policy and before the loss, was used and occupied as a joiners' shop, and thereby was exposed to a greater risk than when insured, of which the plaintiff had notice, &c. The replication, to which the defendants have demurred, replies, that it was not so used and occupied with the knowledge of the plaintiff. The question thus raised is, whether such use of the house after the assignment, and unknown to the assignee of the policy, avoids it.

We have already stated our conclusion, that the plaintiff held this policy subject to be defeated by all breaches done or suffered by the assignor after the assignment and prior to the loss; and in application to this portion of the pleadings, need add nothing more. There is very great justice, and very high authority for holding, that the description in a fire policy of the construction and use of the premises insured, constituting as it does the basis of the insurance and determining the amount of the premium, is tantamount to a warranty on the part of the assured, that this description shall remain substantially true while the risk is running; and that no alteration in either shall subsequently be made by the insured, to enhance the liability of the insurer. *Sillem v. Thornton*, 3 El. & Blackb. 868, 883. "It seems strange," says Lord Campbell, in delivering the opinion of the court in the case just cited, "that if a house be described in the policy as occupied by the owner carrying on the trade of a butcher, so that the premium is on the lowest scale, he may,

immediately afterwards, merely taking care that the walls and floor and roof remain, so that it shall be the same identical house, convert it into a manufactory of fireworks, a trade trebly hazardous, for which the highest scale of premium would be no more than a reasonable consideration for the stipulated indemnity." The 28th section of the act incorporating the defendants recognizes and applies precisely this reasoning. It provides, not only that "no sugar-house, bake-house, distil-house, or joiners' shop, or other house," in which certain hazardous trades are carried on, "shall be insured in said company, but on such terms only as shall or may be especially agreed on by the directors," but that "no policy shall extend, or be construed to extend, to any of the houses, buildings, or risks specified in this section, unless the same is expressly mentioned in the policy, and a proportional premium and deposit paid; nor shall any policy extend to, or be construed to extend to, any house or building in which more than twenty-eight pounds of gunpowder shall have been for twenty-four hours next before the time that the same house or building was burnt." The only purpose of this section is, to exclude the specified risks from the policy unless named and paid for; and it applies, in our judgment, to exclude them, as well when arising during the running of the policy from a change of use, as when the prohibited use exists at the time of effecting the policy. In other words, it holds the insured to the risk he describes and pays for, to this extent, at least, that he has no policy for the risks prohibited, if he has not described and paid for them. The consequence of this must be, that the moment he changes the use of the insured premises to any of those thus conditionally forbidden his policy ceases to attach, and the liability of the company upon it is determined.

The plea, in our judgment, sets up a good bar to the count; the replication was no sufficient answer to it, and must, therefore, be overruled.

The result is, that the plaintiff is entitled to judgment upon the first count, and the defendants upon the second count, in the declaration.

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6	534
18	666
18	813
6	534
30	593

ROBERT S. BURROUGH & WIFE v. WILLIAM FOSTER.

A testatrix made to her grandchildren several specific devises "to their heirs and assigns forever;" and in the eighth clause of her will proceeded:—

"Eightly. I give and devise all the remainder of my real estate unto all my grandchildren, in equal shares, and to their heirs and assigns forever. And it is hereby provided, and my will is, that if any of my grandchildren should die, leaving no surviving issue; then I give and devise all the estate, both real and personal herein given to such grandchild, unto the survivor or survivors of such as shall die as aforesaid, and to their heirs and assigns forever; provided, that none of my grandsons shall, in any event, have any of my personal estate, other than the specific legacies herein bequeathed unto them, as long as any of my granddaughters, or any of their issue be living. It is also further provided, and my will is, that if all my grandchildren should die leaving no surviving issue, then I give and devise all my estate unto two of the daughters of my uncle, Thomas Field, to wit: Mary and Sally, and unto two of my said uncle's grand-daughters, to wit: Mary and Elizabeth Thornton, and to their heirs and assigns forever." Held, that the grandchildren of the testatrix took estates-tail in her real estate, and not fee-simples conditional upon their dying without issue.

TRESPASS and ejectment to recover possession of a lot of land, thirty-five feet wide and about one hundred and ninety feet deep, on the north side of Charles Field Street, in Providence, and six thirtieth undivided parts of an adjoining lot on the east, twenty-three feet wide.

To the declaration, which contained two counts, the defendant pleaded, beside the general issue, soil and freehold in Horace A. Wilcox and Sally B. Wilcox, his wife, in right of the said Sally, and his title as lessee under them; and twenty years' possession, under the statute, in said Wilcox and wife and himself before the date of the plaintiffs' writ. The parties joined in the general issue and in the issue to the country tendered by the plaintiffs upon their traversing the defendant's plea of title. To the plea of possession the plaintiffs replied, that the female plaintiff, in whose right the plaintiffs sued, was sole, unmarried, and an infant, until the 25th day of December, 1848, when she became of age, and that the plaintiffs within ten years next after commenced the action; which was traversed by the defendant and issue joined to the country.

At the March term of this court, 1858, the chief justice presiding, a *pro formâ* verdict was entered by consent, finding all the issues for the plaintiffs, with the agreement, that if

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the court should determine that the estates given by the will of their grandmother, Waite Smith, to the children of Martha Howell, are estates-tail, then the verdict is to stand, if not, to be set aside.

The will of Waite Smith, which was dated on the 5th day of February, 1808, and proved on the 4th day of August, 1819, after making, amongst other things, several specific devises to each of her grandchildren, thus disposes of the residue of her real estate:—

“ Eighthly. I give and devise all the remainder of my real estate unto all my grandchildren, in equal shares, and to their heirs and assigns forever.

“ And it is hereby provided, and my will is, that if any of my grandchildren should die, leaving no surviving issue; then I give and devise all the estate, both real and personal herein given to such grandchild, unto the survivor or survivors of such as shall die as aforesaid, and to their heirs and assigns forever:

“ Provided, that none of my grandsons shall, in any event, have any of my personal estate, other than the specific legacies herein bequeathed unto them, so long as any of my grand-daughters, or any of their issue be living.

“ It is also further provided, and my will is, that if all my grandchildren should die, leaving no surviving issue, then I give and devise all my estate unto two of the daughters of my uncle Thomas Field, to wit: Mary and Sally, and unto two of my said uncle's grand-daughters, to wit: Mary and Elizabeth Thornton, and to their heirs and assigns forever.”

Browne, with whom was *Bradley*, for the plaintiffs.

The question presented in the case is, whether the will, under which the parties claim, creates an estate tail, or an executory devise.

1. The rule of construction is favorable to the creation of an estate-tail, and not an executory devise. *Purefoy v. Rogers*, 2 Saunders, 380; *Mussell v. Morgan*, 3 Term, 763; *Nightingale v. Burrill*, 15 Pick. 110; *Parker v. Parker*, 5 Metc. 138; 1 Jarman on Wills, 778; 3 Greenleaf's Cruise, 457, n. 2, 463.

2. The words, “ die without leaving heirs,” import an indef-

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inite failure of issue, and create an estate-tail. *Jones v. Owens*, 1 B. & Ad. 318; 17 Vesey, Jr. 482; *Machell v. Weeding*, 8 Simons, 4; *Cadogan v. Ewarts*, 7 Ad. & Ellis, 636; *Todd v. Dewsberry*, 8 Mees. & Welsb. 513; *Ide v. Ide*, 5 Mass. 500; 8 Ib. 3; 4 Kent's Com. 274, 276; 2 Jarman on Wills, 418; Lewis on Perpetuities, 192.

3. This construction is not varied by such qualifying words as "survivor," "surviving," or the like. 2 Jarman on Wills, 448; Lewis on Perpetuities, 218, 223; 4 Kent's Com. 276, 279; *Anderson v. Jackson*, 16 Johns. 382, 415; *Wilkes v. Lyon*, 2 Cowen, 333; *Bell v. Gillespie*, 5 Randolph (Va.) 273; *Newton v. Griffith*, 1 Har. & Gill, 111; *Hoxton v. Archer*, 3 Gill & Johns. 211; *Denn v. Moore*, Coxe, 386; (2 U. S. Dig. 78, Art. 164;) *Haines v. Wither*, 2 Yeates, 400; (2 U. S. Dig. 75, Art. 129;) *Clarke v. Baker*, 3 Ser. & Rawle, 470; *Casking v. Brewer*, 17 Ib. 441; *Eichelberger v. Barnitz*, 9 Watts, 450; *Rancel v. Creswell*, 30 Penn. 158; *Criley v. Chamberlain*, Ib. 161; *Parker v. Parker*, 5 Mass. 139; *Massey v. Hudson*, 2 Merivale, 133; *Ranelagh v. Ranelagh*, 2 Mylne & Keene, 441.

4. The last devise favors the construction which gives to "heirs," in the first clause, the meaning of "heirs of the body," and thus creates an estate-tail. 2 Jarman on Wills, 238; 3 Comyn's Dig. N. 5, "Devise," 398; 1 Cov. & Hughes's Dig. 507, "Devise," XII. 29; *Morgan v. Griffith*, 1 Cowper, 234; *Lillibridge v. Eddy*, 1 Mason, 239.

5. This construction has been adopted by this court, — acted upon by parties in interest under this will, — and the decision followed in other cases. *Howell v. Mason*, Sup. Ct. Prov. March term, 1847; *Tiffany v. Potter*, Ib. 1855.

T. A. Jenckes, for the defendant.

1. The words of the eighth clause, stating the condition of the devise over, import a failure of issue at the death of each grandchild, and not an indefinite failure of issue. The rule which construes the words "without issue" as importing an "indefinite failure of issue," instead of the failure of issue at the death of any particular person, is an artificial rule, and which should not be extended beyond those forms of expressions in wills, which have received a settled meaning by adju-

dication. 2 Jarman on Wills, 417, *et seq.* Where the intent of the testator is clearly expressed, confining the meaning of such phrases to issue living at the death of any particular person named, that intent should be carried into effect. The artificial rule has been abolished in England, and in some of the states of this country, for the reason that it violates the natural meaning of language, and defeats the intent of the testator. 1 Vict. c. 26, § 29; N. Y. Rev. Stats.; Va. 1819; Miss. 1824; N. C. 1827; *Keily v. Fowler*, 3 B. P. C. 298; *Hall v. Chaffee*, 14 N. H. 216.

The following cases show the qualifications of the general rule, and are applicable to the will in this case. A limitation "if T. died without issue, living his brother W., then to W.," refers to a failure of issue at the death of T. (*Pells v. Brown*, Cro. Jac. 590); so also the words, if one die "leaving no issue behind him," (*Porter v. Bradley*, 3 D. & E. 143,) and if one leave no issue, then life-estates to the "survivor or survivors." *Roe v. Jeffrey*, 7 D. & E. 585.

A limitation "to the survivor" imports a definite failure of issue, in gifts both of real and personal property. *Fosdick v. Cornell*, 1 Johns. 440; *Anderson v. Jackson*, 16 Johns. 382; *Jackson v. Blanshaw*, 3 Johns. 292; *Jackson v. Chew*, 12 Wheat. 153; *Wilkes v. Lion*, 2 Cow. 333; *Cutter v. Doughty*, 23 Wend. 513; *Dawson v. DeForest*, 3 Sandf. Ch. R. 456; *Heard v. Horton*, 1 Denio, 165; *Den v. Schenck*, 3 Hals. 29; *Cerolle v. Cerolle*, 6 Munf. 455; *Rapp v. Rapp*, 6 Barr. 45; *Johnson v. Currier*, 10 Barr. 498; *Morgan v. Morgan*, 5 Day, 517; *Couch v. Gorham*, 1 Conn. 36; *Maffet v. Strong*, 10 Johns. 16; *Richardson v. Noyes*, 2 Mass. 56; *Ide v. Ide*, 5 Ib. 500; *Paterson v. Ellis*, 11 Wend. 292; *Abbot v. Essex Co.* 2 Curtis, 133; *Crane v. Cowell*, 2 Curtis, 178; *Abbot ex ux. v. Essex Co.* 18 How. 203.

The limitations of the personal estate are clearly referable to the failure of issue at the death of each grandchild. The plaintiffs contend for two different limitations — an indefinite failure of issue as to the realty, and a definite failure as to the personalty. But the weight and number of authorities is against this distinction. *Abbot v. Essex Co.* supra; 2 Atk. 314, Lord Hardwicke; 2 Russ. & M. 390; 1 Bro. C. R. 188, Lord Thurlow;

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5 Ves. 440, Lord Alvanley, &c., cited in *Abbot v. Essex Co.* 2 Curtis, 133.

When one limitation of a devise is taken to be executory, all subsequent limitations must likewise be so taken; hence, if the limitation to the "survivor or survivors" of Waity F. Howell is executory, then the two daughters and grand-daughters of Thomas Field would take by way of executory devise. 6 Crutse, 409; *Purefoy v. Rogers*, 2 Saund. 388, note. In the construction of this will the declared intention of the testatrix must be effectuated, if by law it may prevail. The different devises must be combined, in order, if possible, to give a uniform construction to the whole will. *Lippitt v. Hopkins*, 1 Gall. 454; *Hall v. Chaffee*, 14 N. H. 216.

Bosworth, J.¹ The question submitted to the judgment of the court in this case is, whether under the will of Waite Smith, Martha Howell took an estate-tail in the premises in controversy.

The eighth clause in said will gives and devises all the remainder of the real estate of the testatrix unto all her grandchildren, in equal shares, and to their heirs and assigns forever. This devise is qualified by a provision, that if either of the grandchildren should die leaving no surviving issue, then all the estate of the testatrix in her will given to such grandchild, is given to the survivor or survivors of such as shall die as aforesaid, and to their heirs and assigns forever. It is further provided, that if all the grandchildren should die leaving no surviving issue, then the estate is given over to certain other persons therein named.

By the first clause of this article in the will, an estate in fee-simple is given to the testatrix's grand-daughters. The subsequent provision, in case of their dying without issue surviving, would, if construed to refer to a general failure of issue, cut the estate down to a fee-tail estate, according to the rule of law. This rule of law was established by decisions of the courts of England immediately after the passage of the statute of entailments, Westminster 2, 13 Edw. I. c. 1, and has continued a

¹ The chief justice, having been of counsel, did not sit in this case.

recognized rule in the courts of England and this country, from a period so far back as the year 1285 down to the present time. This rule seems to have resulted from the interpretation of the statute *de donis*, which was very early adopted into our laws, and, subject to its modification by our statutes, may be considered as in force here now. In some of the states of this country, fee-tail estates have been abolished; and this fact may, perhaps, to a considerable extent, account for the contrariety of decisions in reference to the technical words, which, by so many decisions of the English courts, have so uniformly been established as words creating a fee-tail. The rule, that a devise over upon an indefinite failure of issue, — as after the devise to a man and his issue, or after a devise in fee, — is void for remoteness, or as tending to a perpetuity, is not controverted. The question is as to what words import an indefinite failure of issue, as distinguished from a definite failure, or a failure within a precise time fixed. If the devise over is upon a failure of issue at a particular time fixed, as at the time of the death of the first taker, the gift over is good by way of executory devise; for it is not liable to the objection of remoteness, and does not tend to a perpetuity.

Now, it appears from a very numerous catalogue of cases, both in the English courts and in the courts of this country, that the words, die without issue, or without having issue, or without leaving issue, import a general failure of issue; and the limitation over after the death of a person upon a failure of issue which these words imply, is construed as a limitation upon an indefinite failure, unless the force of the words is restrained or their import controlled by other expressions in the limitation, or by circumstances arising on the face of the will in relation to the land, or to the donee or devisee. If the words are, leave no issue at the time of his death, of course the failure intended is defined as a failure at the time of the death. If the words are, die without issue living W., the words import a failure upon the death of the person named in the lifetime of W., or when W. is living. And in one case it was decided, that the words, "if one die and leave no issue behind him" would operate to restrict the limitation to a failure at the

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death of the first taker. *Porter v. Bradly*, 3 Durnf. & East, 143. In neither of these cases can we find authority for restricting the words of this will to a failure of issue at the death of each grandchild.

In the case of *King v. Rumball*, (Cro. Jac. 448,) there was a devise of lands to the wife for life, remainder to three daughters, and if any of them died before the others, then the others to be her heirs, and if they all died without issue, remainder over. It was held that the daughters took vested estates-tail. In the case of *Chadock v. Cowley*, Cro. Jac. 695, there was a devise to A. and B. severally in fee, and that the survivor should be heir to the other, if either of them died without issue; and the court held, that A. and B. took estates-tail, with cross remainders over, in fee.

The words used here are, "die leaving no surviving issue." The words, die leaving no issue, by all the English decisions, import a general failure of issue. There is nothing here to limit their import but the word "surviving." How this changes the meaning of the words we do not see, and there is no decision making the use of this word an indication of an intent to limit the failure to a definite period. If he dies and leaves issue, he must leave them surviving. The question is, whether the estate is to go over in the event of there being no surviving issue at the period of the death, or none surviving at some remote period, whenever it shall occur; and it seems to us that all the logic which can be urged in favor of the interpretation so uniformly put, by the English decisions, upon the one set of words, is equally potent when applied to the other.

There is a class of decisions in this country to which we are cited, which have assumed to deny the interpretation given to these words, and to hold them to import a failure of issue at the death of the first devisee. The case of *Fosdick v. Cornell*, 1 Johns. 440, is the leading case of this class. That decision has been followed in the state of New York, until it has now become the settled law of that state. In the case of *Anderson v. Jackson*, 16 Johns. 382, the question arose in the court of errors of that state, and the previous cases in the supreme court were reviewed, and the doctrine established by them affirmed.

In that case Chancellor Kent, who had been chief justice of the supreme court when the case of *Fosdick v. Cornell* was decided, reconsiders the subject, and in a very able and thorough examination of the state of the law and the whole current of decisions from the year 1285 downwards, shows, that the supreme court had departed from the law in the decision of the case; acknowledges his error; and gives his opinion against the decisions in which he had previously joined. The majority of the court, however, differed from him, and decided the case (if we may judge from the only opinion given on that side of the case, the opinion of a senator) mainly on the authority of the case of *Fosdick v. Cornell*, and other cases in the supreme court, which Chancellor Kent, who participated in them, deemed to be founded on error, and which he shows in his opinion, conclusively, as we think, contradicted the whole current of the English cases. At that time, there had been three decisions in the supreme court of New York affirming the doctrine decided in *Fosdick v. Cornell*, and the court of errors felt themselves not warranted to interfere in disturbing titles which might have been acquired under the repeated and solemn decisions of the supreme court. If this consideration had weight with the majority of the court of errors in that case, such a consideration should, we think, for much stronger reasons, weigh upon the deliberations of this court, in leading us to a conclusion opposite to the one to which they arrived. In this court, there have been at least three decisions to the effect that the form of words in this will, and similar words, operate to create an estate-tail, because they import an indefinite failure of issue. One of these decisions was in a case arising upon the words of this very will. These decisions have doubtless been made under the authority of the English decisions growing up after the enactment of the statute *de donis*. These decisions, and the statute, so far as it applies, are, we apprehend, a part of our common law. If the New York courts ought, upon the doctrine of *stari decisis*, to rest upon the decisions of their supreme court, though they may vary from the English decisions; ought this court to run the risk of unsettling the law and of disturbing titles under the law as heretofore settled, by overturning

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their own decisions, when, too, those decisions are found to be in accordance with the English cases? It is said that the rule which construes the words, without issue, and the like, as importing an indefinite failure of issue, is an artificial rule; and that it has been abolished in England, and in some of the states of this country, for the reason that it violates the natural meaning of the language, and defeats the intent of the testator. The fact that the rule has been abolished by statute, shows that prior to the statute it had become established; and if in England and other states it has been found necessary to abolish the rule by legislative acts, we ought not to attempt to do the same thing by judicial construction. In truth, this rule of law has been so long settled by the decisions of courts, that we are authorized to believe, that whenever the words are used in a will, they are used with reference to the construction which the law has put upon them. Whether the construction is the natural one or not, it is the legal one; and if we change it by a judicial interpretation now, we may interfere with titles acquired on faith of the law as heretofore settled, and create mischiefs which we may not foresee.

We therefore overrule the exceptions, and judgment must be rendered upon the verdict.

OLNEY C. CARPENTER v. JAMES M. CARPENTER & others.

In ejectment to recover possession of lands mortgaged to the plaintiff, it appearing by the defendants' plea, that the mortgage was given to secure the payment of a promissory note the principal sum of which was payable at the end of four years, but the interest *annually*, it was held, that the condition of the mortgage was broken by the non-payment of the annual interest for three years, although the principal sum was not due; and that conditional judgment for possession must be entered up for the plaintiff, in conformity to sect. 7, ch. 189, of the Revised Statutes.

EJECTMENT to recover lands in Gloucester. One of the pleas was, that the plaintiff's title was by mortgage executed to him by the defendants, on the seventh day of April, 1857, with condi-

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tion to pay a promissory note of \$400 at the end of four years, *with interest payable annually.*

Brownell, for the defendants, objected to a conditional judgment for the plaintiff, upon the ground, that although three years' interest was due under the mortgage, the principal sum was not due, and so the condition of the mortgage was not broken.

THE COURT, however, held the condition of the mortgage to be equally broken by the non-payment of interest, stipulated to be paid annually, as it would be by the non-payment of the principal when due; and ordered conditional judgment for possession to be entered up, in conformity with the provisions of the 7th sect. of ch. 189 of the Rev. Stats.

SAMUEL BRYAN & Wife v. GEORGE H. BATCHELLER.

An adulterous elopement from the husband, without reconciliation, is no bar to dower in Rhode Island: the 34th section of the statute of Westminster 2d, 18 Edw. I., never having been introduced here.

THIS was an action of dower, the declaration in which claimed dower for one of the demandants (the other being her husband) in the homestead estate of the late Ebenezer Wood, in North Providence, alleging her coverture with said Ebenezer whilst he was seised of said estate.

The second plea alleged, that the female demandant, in the lifetime of her husband, the said Ebenezer, left him of her own will and choice, and eloped from him with the other demandant, to Huntingdon, in the State of New York, and there, afterwards remained a long time in adultery with him to the end of the life of the said Ebenezer, and that said Ebenezer was never, in his lifetime, reconciled to her.

To this plea there was a general demurrer and joinder.

James Tillinghast, for the demandants.

1. This plea is bad as a bar to the action. Elopement and adultery are no bars to dower at common law. 2 Inst. 435;

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2 Blackst. Com. 130; *Reynolds v. Reynolds*, 24 Wend. 194, (Bronson, J.); *Hetherington v. Graham*, 6 Bing. 135, (Tindall, C. J.); 19 Eng. Com. Law, 32.

2. They became so only by statute of Westminster 2d, ch. 34, (13 Edw. I.,) which never was introduced into this state. It is not included in the statutes introduced by the Digest of 1767, (p. 55.) That enumerates among the statutes introduced here, "Westminster the second, *de donis conditionalibus*;" and it cannot be pretended this embraced, or was intended to embrace, anything more than the first chapter of that statute, the only one that at all concerns "estates upon conditions." Compare 1 Eng. Stat. at Large, 163, 164, *et seq.*; 6 Jacob's Law Dictionary, 163; 4 Kent's Com. 11; 2 Blackst. Com. 112; 1 Washb. Real Property, 67, 608, 680, Index.

3. But if by any construction this chap. 34 can be held ever to have been introduced here, it was repealed by the Digest of 1798, (p. 77,) especially when taken in connection with the statute of dower then enacted, (p. 244.) Under this statute the only bar of dower was *the deed of the wife*. Sect. 1. And this has continued our statute of dower in precisely the same language (only in later revisions a jointure being also added as a bar) to the present time; see Digest of 1822, p. 188, § 1; Digest of 1844, p. 188, § 1; Rev. Sts. of 1859, p. 503, § 1; particularly when taken in connection with the repealing acts of 1822. Dig. of 1822, pp. 64, 65; Dig. of 1844, p. 61; Rev. Sts. p. 633; by the last of which "all acts, and parts of acts, the *subjects whereof* are revised and reënacted in this revision, . . . shall be repealed from and after," &c. Clearly, therefore, the *subject of dower* being revised and reënacted in that revision, all other acts concerning dower are thereby repealed. Dower, therefore, remains in this state as at common law, so far as respects the question now before the court. See *Reynolds v. Reynolds*, 24 Wend. 193.

Hart, for the tenant.

1. The plea, though not good at common law, is good under the statute of Westminster 2d, 13 Edw. I., ch. 34; 4 Kent, pp. 52, 53, and notes; Greenleaf's Cruise, vol. 1, pp. 170, 199, top paging; Title 6, ch. 1, § 17; Title 6, ch. 4, §§ 4-8, and notes.

2. The statute of Westminster 2d was specially introduced in

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the colony of Rhode Island before the Declaration of Independence, and is now a part of the common law of the state. Digest of 1767, p. 55; Rev. Sts. ch. 245, p. 632.

BOSWORTH, J. The question arises in this case upon demurrer to the defendant's plea. The point raised is, whether elopement of a wife and living in adultery, without reconciliation with the husband, bars a claim for dower under the law of this state?

The statute of this state provides, (Rev. Sts. ch. 202,) that the widow of any person dying intestate, or otherwise, shall be endowed of one full and equal third part of all the lands, tenements, and hereditaments, whereof her husband, or any other to his use, was seised of an estate of inheritance, at any time during the intermarriage, to which she shall not have relinquished her right of dower by deed, except in cases provided for in the 21st section of the chapter. The section containing the excepted cases provides, that real or personal estate conveyed by deed, or devised or bequeathed by will, for the jointure of the wife, in lieu of her dower, to take effect in her own possession immediately upon the death of the husband, and to continue during her life, or in fee, determinable by such acts only as would forfeit her dower at common law, shall bar dower.

The statute, therefore, provides of what, and to what extent, the widow shall be endowed, and also by what acts, and by what means, she shall be barred of her dower.

It is claimed, in this case, that there is a forfeiture. There is no forfeiture, of such a character as is here set up, provided by the Revised Statutes. Such a forfeiture did not exist at common law, and the only ground on which it is now put is, that by the English statute of Westminster 2d it is enacted, that elopement and living in adultery, without reconciliation to the husband, is made a forfeiture to bar the widow of her dower.

We do not think that such a bar to dower ever existed in this state, or that such a ground of forfeiture was ever recognized by our law. Statutes regulating dower were first passed in this state, or first appear, in the digest of the laws in 1798. Prior to that time, the statute of Merton had been introduced into the colony; and the statute of Westminster 2d, *de donis*

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conditionalibus. The former of these was an English statute relating to dower; and the latter a statute relating to estates upon condition. The counsel has fallen into the error of supposing that the whole of the statutes of Westminster 2d were adopted; whereas the enumeration, referred to by him, shows, that only the statute *de donis*, which is the first chapter of those statutes, was introduced into our laws. It is chapter 34 of the statute of Westminster 2d, 13 Edw., that makes provision for this forfeiture. It may, at first, seem singular that our law should be so regardless of what seems so just and reasonable a ground of forfeiture. The common law, however, did not regard elopement and adultery as a forfeiture, even where the parties were divorced, unless the divorce was *a vinculo*. A reason for this state of our law may, however, be found in the nature of our decree of divorce, which was, we believe, always when for this cause, *a vinculo*. The statute of divorce was passed in 1748, while that of dower was passed in 1790; so that the cause of forfeiture, under the statute of Westminster, was cause for divorce *a vinculo*, under our statute, since 1748. Under the statute of Westminster, a reconciliation and living with the husband, after the fact, would reinstate the wife in her right of dower; and if, after the fact was known to the husband, under our law, he took no steps to procure a divorce, as he might if he saw fit, by which his wife would be effectually barred of all right to claim dower in his estate, the wife seems always to have been left, by our law, in the same condition as she would be under the 34th chapter of Westminster 2d, by a reconciliation and living with her husband. This plea must, therefore, be overruled, as no bar to the claim of the demandants.

ANDREW C. CRAIG & CO. v. WALTER R. PROCTOR.

There is no legal intendment, under chapter 78 of the Revised Statutes, that domestic liquors, sold in large quantity, are illegally sold, so as to relieve a defendant, who attempts to impeach his own promissory note upon the ground that it was given to secure the price of liquors illegally sold, from the burden of satisfying the jury, by direct or circumstantial proof, that the plaintiffs were not manufacturers or distillers of liquors in this or some other state, or that the sale was not made for the purpose of exportation.

ASSUMPSIT to recover the amount of a promissory note for \$400, dated Providence, September 7th, 1859, and made by the defendant, payable to the plaintiffs four months after date. At the trial of the case, under the general issue, at the present term of the court, before the chief justice with a jury, it appeared that the defence to the note was, that it was given by the defendant to the plaintiffs to secure the price of intoxicating liquors sold by the plaintiffs, in this state, to him, in violation of chapter 78 of the Revised Statutes. After the evidence was in, the presiding judge charged the jury, that it was incumbent upon the defendant, in order to make out his defence, to satisfy them, not only that the liquors were sold in this state by the plaintiffs to the defendant, but that said liquors were not sold by the plaintiffs as manufacturers or distillers for the purpose of exportation; the burden being upon the defendant to show that the plaintiffs were not such manufacturers or distillers, either in this state or some other state, as well as to make out the illegal purpose of the sale; although the jury were entitled to consider the kind and quantity of the liquor, the manner, and all the circumstances of the sale, in arriving at their conclusion upon these subjects. Under these instructions, to which the defendant excepted, a verdict for the amount of the note, with interest, having been rendered for the plaintiffs, a motion for a new trial was now made, on the ground that the above instructions were erroneous in matter of law.

Hazard, with whom was *Hart*, for the defendant.

1. Where the sale of liquors, except by persons duly authorized and for particular uses, is prohibited, it is incumbent on the plaintiff, in the action to recover the price, to show affirmatively

that he was duly licensed to sell them, and that they were sold for a lawful purpose. *Bliss v. Branard*, Law Reporter, October, 1860, p. 361, Supreme Judicial Court, New Hampshire. The act of the Legislature of New Hampshire is identical with ours. See Law of New Hampshire, June, 1855, p. 1528, entitled "Suppression of Intemperance."

2. The analogy in criminal cases touching these provisos and exceptions and the burden of proof in relation to them, we think, has a bearing as to what the rule in civil cases should be. "If exceptions are in the enacting clause, qualifying the description of the offence, the indictment must negative the exceptions. When they are in other clauses of the act, they need not be negatived, for they are matters of defence that the prosecutor need not anticipate." Wharton's American Criminal Law, 4th ed. p. 379, §§ 378, 379. But as to the exceptions in the enacting clause that the indictment must negative, whether they are to be proved by the prosecutor or defendant depends upon the following considerations: "If the subject-matter of the exception relate to the defendant personally, or is particularly within his knowledge, the negative is not to be proved by the prosecutor, but by the defendant. If on the other hand the subject of the averment do not relate personally to the defendant or be not peculiarly within his knowledge, but either relate personally to the prosecutor or be peculiarly within his knowledge, or as much within his knowledge as within the knowledge of the defendant, the prosecutor must prove the negative." Wharton's Criminal Law, 4th ed. p. 614, § 614.

3. The words, "except for the purpose of exportation" in the first section of our act, must be taken with the last clause of the 14th section, showing that the statute does not authorize the keeping and selling liquors for exportation by any other persons than manufacturers and distillers; and we think it equally clear, that the legislature did not intend to authorize the manufacture or sale for exportation by any others than manufacturers and distillers in the state. A reference to previous statutes confirms this view. The law is in fact the act of May, 1852, sometimes called the Maine Law, with such amendments as have been made necessary by judicial decision,

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and the slight modification to be referred to. See the Act of May, 1852, Pub. Laws, p. 915, 1st and 8th sections, which prohibit all manufacture of intoxicating liquors, except cider and alcohol for exportation. The act of January 1853, 1st and 8th sections, Pub. Laws, p. 498, went a little farther, and authorized in addition the manufacture of wine and malt liquors for domestic uses. The act, as it now stands, authorizes the manufacture of all kinds of liquors for exportation; evidently designed to protect the manufacturers from the penalty of an act whose real design was to suppress intemperance by stopping the traffic in the state. See section 28th of present law.

Brownell, for the plaintiff.

1. The contract was legal on its face. The liability of the defendant could only be avoided by showing that there was no consideration, or that the note was given for an *illegal* consideration. The burden of proof was on the defendant to establish the *illegality* of the sale. *Wilson v. Melvin*, 13 Gray, 73.

2. Any manufacturer or distiller of liquors may hold, own, keep, and *sell* the same, *for exportation*. Rev. Stats. ch. 78, §§ 1, 14.

AMES, C. J. The plaintiffs having submitted to the jury the defendant's promissory note, which imported consideration, the burden was certainly upon the defendant to show by proof the illegality of the contract which constituted his defence to it. Had all sales of liquor in this state been illegal, he would have proved his defence, by merely proving that the consideration of the note was the price of liquors sold in this state. The general assembly have, however, for the benefit of trade and commerce, expressly excepted, in the enacting clause of the first section of their statute prohibiting the sale and manufacture in this state of intoxicating liquors, their sale or manufacture for the purpose of exportation; and again, in the 14th section, when enumerating the persons by whom, and the circumstances under which, liquors of this sort may lawfully be sold and kept for sale in this state, have expressly declared it to be lawful "for any manufacturer or distiller of liquors of all kinds, to hold, own, and keep and sell the same, for exportation." Rev. Stats. ch. 78, §§ 1 and 14. The policy of the act, as its title indicates,

was to suppress intemperance within the state; and not to interfere with the manufacture or sale of a principal article of commerce, when sold here for exportation, and especially when held, owned, kept, or sold here by the manufacturer or distiller thereof, for that purpose. Looking at the policy of those clauses of the act, we do not feel at liberty to narrow the general and inclusive words which express it, so as to exclude any sale made here for the purpose of exportation, whether made by our own distillers or manufacturers of liquors, or those of other states. It is very plain that under such a statute as this there can be no legal intendment that every sale of domestic liquors, especially in the quantity represented by the amount of this note, is not for exportation; but the intendment must be the other way: that is, until the contrary is proved, in favor of the legality of the transaction. It was quite as easy at least for the defendant, who was a witness in the case, to have denied that the liquors were sold to him for the purpose of exportation, as for the plaintiffs to have proved that such was the purpose of the sale; and we think, that, in the absence of proof so easy to be made by the defendant, the judge who presided at the trial committed no error in instructing the jury, that the burden was upon the defendant to satisfy them that the plaintiffs were not manufacturers or distillers of the liquor sold, either in this or some other state, or did not sell it to the defendant for the purpose of exportation; the jury being entitled in arriving at their conclusion upon these points, to consider the kind and quantity of liquor sold, as well as the manner and all other circumstances of the sale. The instruction amounted to nothing more, than that the burden of impeaching his note, on the ground of the illegal nature of the transaction in which he gave it, was upon the defendant; a proposition too plain to be disputed, and recently applied, as we here apply it, by the supreme court of Massachusetts, to a similar defence to a case similar to the one at bar. *Wilson v. Melvin*, 13 Gray, 73.

The motion for a new trial is overruled, with costs; and judgment must be entered upon the verdict.

FIDELIO FENNER v. ZACHARIAH R. TUCKER.

An auction sale of land under a power contained in a mortgage may be avoided, where, by a mistake in the advertisement, the sale is advertised to be made in one year, and was designed to be made and was actually made in the succeeding year; or where the tract of land as advertised, although by its description it includes the lot sold, contains double the area of the latter.

A purchaser at such a sale, who when bid against expostulates with a rival bidder, informing him of his losses, and telling him that on account of them he ought not to bid against him, thereby causing the bidder to withdraw, and obtaining the land at a considerable undervalue, will not be allowed to retain the benefit of his purchase against a subsequent mortgagee of the land who seeks to redeem the mortgage under which the sale is made.

BILL IN EQUITY, filed by the mortgagee of a tract of land in Cranston, near what is now called Elmwood, to set aside a sale under a power contained in a prior mortgage of the same tract, and to redeem that and another prior mortgage.

On the 20th day of June, 1853, one Samuel Slocum, being then owner of the tract, mortgaged the same to one Henry J. Holden in fee, to secure the sum of twenty-eight hundred dollars, and afterwards, on the second day of November, 1855, executed another mortgage of the same tract, in fee, to one James T. Slocum, to secure the sum of one thousand dollars, which last-named mortgage contained a power of sale, authorizing the mortgagee, his personal representatives or assigns, in case of default in payment for the term of ten days of the mortgage debt, or of the semiannual interest due thereon, to sell the premises or any part thereof at public auction, first giving, after the expiration of said term of ten days, twenty days' notice of such sale in some one of the public newspapers printed in the city of Providence. Subject to the above mortgages, the equity of redemption in said tract, by mesne conveyances from Samuel Slocum, became vested in one Arthur M. Potter; who, on the 25th day of February, 1858, conveyed a portion of said tract in fee, with warranty, to one Joseph Adams, and afterwards, on the 26th day of February, conveyed the remaining portion of the same to Nancy Greene, wife of William H. Greene, taking back from Greene and wife a mortgage to secure a portion of

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the purchase-money. The larger portion of the purchase-money agreed to be paid by Greene and wife was by them to be applied to the payment of the two Slocum mortgages, in relief of the portion of the tract sold by Potter to Adams with full warranty.

The plaintiff's title to redeem rested upon two mortgages, both executed to him by Joseph Adams on the 25th day of February, one to secure the sum of twenty-one hundred and fifty-six dollars and nineteen cents, and the other to secure to him the sum of one thousand dollars, advanced by him to said Adams.

The respondent first became interested in the tract by receiving from Arthur M. Potter, who was indebted to him, on the 19th day of April, 1858, an assignment of the mortgage which he had taken from Greene and wife. The respondent subsequently, on the 28th day of February, 1859, purchased and took an assignment of the mortgage executed by Samuel Slocum to Henry J. Holden, being the first mortgage on the tract. Before this, however, to wit, on the 15th day of February, 1859, he had become purchaser of the tract at public auction, under the power contained in the second mortgage on the tract, to wit, the mortgage from Samuel to James T. Slocum, and had also, for greater caution, taken an assignment of the last-named mortgage.

It appeared in proof, that by some mistake, the sale under the power, by which the respondent claimed to foreclose the plaintiff's right to redeem, was advertised to take place on the 12th day of February, 1858, but actually was made on the 12th day of February, 1859; the plaintiff not having seen or received any notice whatever of the sale until some time after it took place. It further appeared, that the advertisement was of the whole tract, as originally mortgaged, whereas a portion of the tract had, by consent, been sold, and released from the mortgage.

Evidence was also submitted, on the part of the plaintiff, tending to prove, that the mortgage sale was procured and conducted by the respondent, with a view to his becoming a purchaser at an undervalue; and especially, that at the sale, finding that Ephraim Jackson, a substantial purchaser, was

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bidding against him, he crossed over the platform to said Jackson, and asked him why he bid against him? and in reply to Jackson's excuse, that he supposed it to be a free sale, as advertised, said, that he thought that Jackson ought not to bid against him, as he had lost so much money by the Potters, and expressed some feeling about it; whereupon, Jackson withdrew from bidding, and the estate was knocked down to Tucker, at a considerable undervalue. Upon the point of the respondent's agency in the sale, and of his conduct before and at the sale, with the view of buying it in at a bargain, evidence was submitted on both sides, the result of which sufficiently appears in the opinion of the court.

James Tillinghast, for the plaintiff.

1. The sale under the power was void, inasmuch as it took place a year after the time it was advertised for sale. The advertisement was calculated to mislead the public and those interested into the belief that it was an old advertisement, continued or reinserted by mistake.

2. The advertisement of more land to be sold, than remained for sale, was also calculated to mislead the public, and avoided the sale. *Burnet v. Denniston*, 5 Johns. Ch. 35.

3. The sale is void also on account of the direct interference of the respondent, by which the biddings were stifled, and fair competition prevented. *Fuller v. Abrahams*, 6 Moore, 316; S. C. 3 Brod. & Bing. 116; *Hamilton v. Hamilton*, 2 Rich. Eq. 355; *Wooten v. Hinkle*, 20 Missou. 290; *Longwith v. Butler*, 3 Gilman, 32; *Gardiner v. Morse*, 25 Maine, 140; *Martin v. Ramlett*, 5 Rich. Law, 54; *Haynes v. Crutchfield*, 7 Ala. 189; *Matthie v. Edwards*, 2 Collyer, 465; S. C. 33 Eng. Ch. Rep. 465; 1 Hill on Mortgages, 91; 2 Kent's Com. 539.

4. By his purchase of Greene's mortgage to Potter, the respondent had notice of the agreement by which, as between Potter, Greene, and Adams, the Slocum mortgages were to be wholly imposed upon Greene's portion of the tract, and is estopped in equity from now claiming in contravention of that agreement.

Lapham, for the respondent.

1. The right of the complainant to redeem the Slocum

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mortgages is cut off by the sale, under the power contained in the younger of those mortgages; this mortgage being prior in date to the title of the complainant.

2. The advertisement included the land to be sold, and that is enough.

3. The mistake of the year in the advertisement cannot affect the sale; since it was so palpable as to mislead no one.

4. Many bidders were present, with whose action the respondent did not interfere; and as to Jackson, the respondent said no more than he had a right to say.

BOSWORTH, J. Upon the statements of the bill admitted in the answer, it is clear, that prior to the sale of this land under the power contained in the mortgage of James T. Slocum, the complainant had a right to redeem by paying the amount due on the two mortgages prior in date to his. As between him and the respondent, he might do this and hold the land until the respondent should pay his reasonable contribution. Where there are two distinct parcels of a tract of land, of which two persons are severally seised, the whole tract being under mortgage to a third party, the one entitled to either tract has a right to redeem the mortgage, and to take an assignment and hold the land until the other pays his share. The land is charged with a burden, of which each part ought to bear no more than its due proportion. 1 Powell on Mortgages, 261-316, and cases cited.

If the sale under the mortgage of Slocum is a valid sale, and the respondent a *bonâ fide* purchaser at that sale, the complainant is cut off from his right to redeem, because the title sold was prior to his. Sales under mortgages with power to sell, are regarded by courts with a jealous care. They furnish a very summary mode of obtaining payment of a mortgage debt and of foreclosing an equity of redemption, and should therefore be conducted with perfect fairness, in order that the mortgagor's rights, or those of his assignees who may have purchased his equity for valuable consideration, may not be sacrificed. If, therefore, the power of sale conferred by the mortgage is not strictly and fairly pursued; if the execution of the power is tainted with fraud; or if any mistake is

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made in conducting the sale adapted to mislead those who might desire to purchase, so that the sale, if at auction, occurs under circumstances calculated to depreciate the value of the property sold, or prevent it from bringing a fair auction price, the sale will be held invalid.

The sale authorized in the power annexed to this mortgage, was to be made after advertising the premises for the space of thirty days, prior to the sale. A sale without this notice would certainly be void. It was incumbent therefore on the mortgagee to give this notice. In giving it, he must advertise the premises to be sold, and give the public notice of the time and place of sale. If the premises are not truly described, it cannot be truly said that the premises are advertised; if the time and place of sale are not made reasonably certain, it cannot be said that public notice of the sale is given. In both respects adverted to, the notice given of this sale is defective and insufficient. The tract advertised was a tract of land containing four acres more than the tract embraced in the mortgage. Although the tract sold was contained in the tract advertised, yet the tract advertised was not the tract to be sold. Persons who might desire to purchase the quantity of land embraced in the mortgage might not want to buy the tract advertised to be sold; and therefore might not attend the sale. The notice given bore date January 21st, 1858, and the sale was appointed to take place on February 12th. Now, although this notice was published in a paper issued in January, 1859, it was not proper notice of a sale to take place in February, 1859. At least, it might mislead the public as to the time of sale. Being dated January, 1858, it would naturally point to the succeeding month of February; and those who read it would naturally suppose it an advertisement of a sale of the past year, continued inadvertently, or published by mistake.

But there is another ground on which the sale was clearly invalid, arising out of the conduct of the purchaser at the sale. By the testimony of Ephraim Jackson, whose deposition is in the case, it appears that after the bidding had commenced, Tucker, the respondent, having made the first bid, and the witness raising his bid, and when several rival bids had been

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made by them respectively, crossed over the platform, and asked the witness why he bid against him. The witness replied, that he thought it was a free sale. The respondent said, the witness ought not to bid against him as he had lost largely by the Potters, and expressed some feeling about it, whereupon the witness withdrew and the estate was struck off to Tucker. The estate, upon the evidence, sold for much less than its value. This witness states in his testimony that he had intended to give a very much larger amount for it than the sum for which it was sold.

In Sugden on Vendors and Purchasers, p. 30, it is laid down "that if a purchaser by his conduct deter others from bidding, the sale will not be binding;" and the doctrine is illustrated by a case cited, which is very similar to this. Upon a sale by auction of a barge, a bidder addressed the company present, saying, that he had a large claim against the late owner, by whom he said he had been ill used, whereupon no one offered to bid against him; but the auctioneer refusing to knock down the property to a single bidder, a friend of the bidder's bade a guinea more, and the first bidder then made a second and higher bid, amounting, however, to only one fourth of the prime cost of the barge; it was held that there was no legal sale. In this case the interference was quite direct, and the bidder was deterred, and the estate was sold for much less than it would have sold for without the interference. See *Fuller v. Abrahams*, 3 Brod. & Bing. 116; S. C. 6 Moore, 316. See also *Troup v. Wood*, 4 Johns. Ch. Rep. 228, 254; *Doolin v. Ward*, 6 Johns. Rep. 194; *Wilbour v. Howe*, 8 Johns. 346; *Thompson v. Davis*, 13 Johns. 112.

For these causes we think that the sale under the power was void, and must be set aside; and the plaintiff must be allowed to redeem the mortgages on the estate held by the respondent, and upon paying the amount due upon them, he will be entitled to have them assigned to him.

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ELIZA A. FISKE, Administratrix, v. JACOB BRIGGS.

6	557
225	72

An action of debt, brought in 1859 upon a judgment obtained in 1837, is barred by the express provision of the first section of the "Act for the limitation of certain personal actions," contained in the Digest of 1844, because not brought "within twenty years next after the cause of action;" that provision being construed to apply to causes of action existing at the passage of the act, whenever such application will not deprive a party of a vested right, by allowing him no reasonable time within which to commence his action.

6	557
29	208

DEBT upon a judgment obtained by the plaintiff, in her capacity of administratrix of Philip M. Fiske, against the defendant, at the March term of the supreme judicial court within and for the county of Providence, 1837, for the sum of seventy-two dollars and five cents, being for costs of a suit in equity, then adjudged to her by said court.

Plea, that the cause of action in said declaration supposed, did not accrue to the plaintiff at any time within twenty years next after the commencement of the action; to which plea there was a general demurrer and joinder.

R. W. & T. C. Greene, for the plaintiff.

1. There was no statute of limitations in 1837, in Rhode Island, relating or applicable to actions of debt upon judgment. The act for the limitation of certain personal actions, found in the Digest of 1822, p. 364, embraced only actions of debts founded upon any contract without specialty, and the limitation to such actions was six years.

2. The Digest of 1844, p. 220, § 1, provided as follows: "All actions of debt founded upon any contract without specialty, all actions of debt for arrearages of rents; actions of debt for other causes, &c., which shall be sued or brought at any time after this act shall go into operation, shall be commenced and sued within the time hereinafter directed and not after, &c. And the said actions of debt founded upon any contract without specialty, &c., shall be brought and commenced within six years after the cause of the said actions, and not after. All actions of debt, other than those before specified, &c., within twenty years next after the cause of said actions, and not after." The Revised

Statutes of Rhode Island, p. 429, § 4, provided, that "all actions of debt, other than those in the next preceding section specified, and all actions of covenant shall be commenced and sued within twenty years next after the cause of action shall accrue, and not after." See, in this connection, Rhode Island Digest of 1844, p. 61, which provides, "that nothing in this act or in any of the acts contained in said Digest shall defeat, discharge, or in any way affect any right, title, interest, duty, obligation, penalty, forfeiture, claim, or demand, which shall have vested, enured, accrued, or become forfeited," by virtue of the laws now in force.

3. The plaintiff claims, that the provisions of § 1, p. 220 of Dig. 1844, (cited before,) so far as they relate to actions of debt upon judgments, are to be construed prospectively, and do not apply to judgments recovered before the Digest of 1844 went into effect. The question of the power of the general assembly under our constitution to pass retrospective laws is not raised in this cause. The plaintiff asks only for a construction of the statute in question, and does not claim that its provisions are repugnant to the constitution.

4. The general principle in the construction of statutes is, that a law is to be construed as having a prospective operation alone, unless, by the explicit terms of the law itself, a retrospective operation is clearly intended. *Dash v. Van Kleeck*, 7 Johns. 477; *Murray v. Gibson*, 15 How. 421.

5. Statutes of limitations, in substance the same as the one in question in this cause, have almost uniformly been construed by the courts of the states where they were enacted to operate prospectively alone, and not to apply to causes of action which accrued or existed before such statutes took effect. In New York, see *Sayre v. Wisner*, 8 Wendell, 661; *People v. Supervisors of Columbia County*, 10 Ib. 363; *Williamson v. Field*, 2 Sandford Ch. R. 568. In Pennsylvania, see *Eakin v. Raub*, 12 S. & R. 331. In Massachusetts, see *Call v. Hagger et al.* 8 Mass. 427; *King v. Tirrell*, 2 Gray, 332. In Illinois, see *Thompson v. Alexander*, 11 Ill. 54; *Trustees of Schools v. Chamberlain*, 14 Ib. 495; *Watt v. Kisby*, 15 Ib. 200; *Tufts v. Rice*, Breese, 36, in appendix. In Iowa, see *Norris v. Slaughter*, 1

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Greene, 338; *Forsyth v. Ripley*, 2 Ib. 181; *Hinch v. Weatherford*, 2 Ib. 244; *Gordon v. Mount*, 2 Ib. 243. In Missouri, see *Paddleford v. Dunn*, 14 Missouri, 519. In Mississippi, see *West Feliciana R. R. Co. v. Stockett*, 13 S. & M. 395; *Brown v. Wilcox*, 14 Ib. 127. In Arkansas, see *Baldwin v. Cross*, 5 Arkansas, 510; *Hawkins v. Campbell*, 6 Ib. (1 Eng.) 513; *Couch v. McGee*, 6 Ib. 573; *Calvert v. Lowell*, 5 Eng. 147; *Morse v. McLinden*, 5 Ib. 512; *Murray v. Gibson*, 15 How. 421.

6. The defendant, under the plea of the statute of limitations cannot avail himself of the common-law presumption of payment at the end of twenty years. A plea of payment, or other plea containing an express averment of payment, is necessary for such purpose. See part 1, Notes of Cowen & Hill to Phillips on Evidence, p. 316, n. 307, and cases cited. *Tilbb's Heirs v. Clark*, 5 Monroe, 526-7; *Forsyth v. Ripley*, 2 Greene, (Iowa,) 182.

Browne & Van Slyck, for the defendant.

1. This action, being an action of debt on judgment, is barred by the Revised Statutes, ch. 177, § 4. This, by its very terms, as the defendant contends, applies alike to all judgments, whether obtained before or after the passage of the act. *Ross et al. v. Duval et al.* 13 Peters, 45, and *Pritchard v. Spencer*, 2 Carter, (Ind.) 486.

2. But the plaintiff claims that the operation of the statute of 1857, cited above, is prospective. Now, even if this be so, still the plaintiff's demurrer cannot be sustained. See Rev. Stats. ch. 246, § 10. Also Dig. 1844, p. 60, § 4; p. 220, § 1.

3. The time had begun to run under the statutes of 1844, cited above, and had commenced to run under that statute when the right of action under this judgment accrued, to wit: April 29, 1837; said statute being clearly retroactive.

4. In the Digest of 1822, p. 364, § 1, there was an express limitation that rendered the statute of limitations prospective. Why was this omitted in the subsequent acts, if the legislature did not mean to have the subsequent acts retrospective, as well as prospective, in this kind of action?

5. If the plaintiff is correct in his position, then no plea of the statute of limitations to a judgment could have been filed

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at any time prior to this, nor until at least in 1864. What effect can be given to the statute, unless regarded as retroactive? and effect will be given to an act by the court, if it can be. This rule is too general to need a citation of authorities. *People v. Utica Ins. Co.* 15 Johns. 358; 28 Miss. (6 Cushing,) 361; *State v. Clark*, 7 Ind. 468.

6. The defendant claims that the statute refers to the remedy, and that the legislature can control the remedy to any extent, so that it does not by its terms take away all remedy or reasonable time to prosecute. *Pritchard v. Spencer*, 2 Carter, (Ind.) 486; *Fowler v. Chatterton*, 6 Bing. 258; *Ansell v. Ansell*, 3 C. & P. 563; S. C. 14-Eng. C. L. 451.

7. The statutes of 1844 and 1857 clearly indicate that the legislature intended that the statute should run from the time the cause of action accrued, and are retroactive; and where a statute of limitations prescribes the time within which suit shall be brought, or an act done, and part of the time has already elapsed, effect will be given to the act; and the time yet to run, being a reasonable part of the whole time, will be considered the limitation in the mind of the legislature in such case. *Ross et al. v. Duval et al.* 13 Peters, 45; *Willard v. Harvey*, 24 N. H. (4 Foster,) 344; *Burcoe et al. v. Anketell*, 28 Miss. (6 Cush.) 361.

8. The power of the legislature to enact a statute of limitations is clear; and so, upon authority, a statute of limitations may be retroactive as well as prospective in its operation; and this effect will be given to such act if the intent that it should retroact be manifest from the acts in question. *Pritchard v. Spencer*, 2 Carter, (Ind.) 486; *Ross et al. v. Duval et al.* 13 Peters, 45.

9. The distinction is this, that courts will not give a retrospective operation to an act of the legislature when it takes away a *vested right*; but not so when it appertains to the remedy. In the case at bar, it applies simply to the remedy, and imposes no hardship upon the plaintiff; because she had at least thirteen years, after the statute of 1844, in which her action could have been brought. *Wadsworth v. Thomas*, 7 Barb. 445, 448; *Sampeyreac et al. v. United States*, 7 Peters, 222.

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10. This act of limitations is in aid of the common law, and not in derogation of it. At the common law payment is presumed after twenty years. This act, upon presumption of payment, makes twenty years a bar.

BRAYTON, J. The plaintiff in this case sues in debt, to recover the amount of a judgment, rendered in her favor against the defendant at the March term of this court, 1837. The defendant pleads in bar, that "the cause of action in the declaration supposed did not, at any time within twenty years next before the commencement of the said action, accrue to the plaintiff," and to this plea the plaintiff has demurred generally.

The question raised upon this demurrer is, whether this action of debt upon judgment falls within the provision of the statute limiting actions of debt upon judgment, contained in the Digest of 1844, p. 220.

At the time this judgment was rendered, there was no act limiting actions of debt upon judgment. The first act limiting such actions was enacted at the January session, 1844, and went into effect on the first day of September of that year. By the act of limitation contained in the Digest of that year, it was provided, that "all actions of debt for arrearages of rents, actions of debt for other causes, and all actions of covenant which shall be sued or brought at any time, after this act shall go into operation, shall be commenced and sued within the time hereinafter directed, and not after, that is to say," "the said actions of debt founded upon any contract without specialty or brought for arrearages of rents" shall be brought and commenced within six years after the cause of the said actions, and not after; "all actions of debt other than those before specified, and all actions of covenant, within twenty years next after the cause of said actions, and not after."

The plaintiff claims in support of his demurrer, that this act does not apply to the case at bar, and that it is inapplicable to any action brought upon a judgment rendered prior to the passage of the act; that the act was designed to operate prospectively upon such judgments as should be thereafter rendered, and not to retroact upon judgments already recovered.

This act was repealed by the Revised Statutes, which went

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into effect on the first day of July, 1857, and the subject of the act was revised and reenacted in said revision with a slight variation in language, adding to the terms "next after the cause of said action," the words "shall accrue." The third section of chap. 246 of the Revised Statutes provides, that "the repeal of the acts hereinbefore referred to, or hereinafter enumerated, shall not affect any act done, or any right accruing or accrued, or acquired or established, or the remedy for any injury thereto, or any suit or proceeding had or commenced in any civil case before the time when said repeal shall take effect."

It will be remembered that twenty years have not expired since the original act of limitation went into effect, that twenty years have expired since the rendition of the judgment on which this suit is brought, and that too, before the repeal of the act in the revision of 1857, and before suit brought. Reference has been made in the argument to the language and provisions of the act in the revision of 1857, as if that consideration ought to influence the determination of this case. The language of that act is no more indicative of a design to give it a retroactive effect than is that of the original act of 1844; and if the act of 1844 be construed not to retroact, the same construction, for reasons at least as good, must be given to that of 1857. If the act of 1844 is held to retroact upon the judgment, then twenty years having expired since the judgment and before the commencement of the suit, and having expired too whilst the act of 1844 was in full force and unrepealed, the bar became perfect, and is saved by the provisions of section 3 of chap. 246 of the Revised Statutes, and is not affected by the repeal.

The question then is, did the act of 1844 retroact upon this judgment and bar any suit which should be brought thereon, unless commenced within twenty years next after the action accrued? and the question is, what did the legislature intend by the language used? That language is, "all actions of debt which shall be sued or brought at any time after this act shall go into effect" shall be commenced and sued, such as are founded on contract without specialty, or for arrearages of rent, within six years, and all other actions of debt "within twenty years, next after the cause of said action." There is nothing

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in this language to indicate a purpose to confine the operation of this act to causes of action which should accrue after the passage of the act. It covers all actions which may be commenced thereafter, and necessarily covers all causes of action for which suit could be thereafter brought. To except this case is not to give effect to the language. The other terms employed are not less significant of a purpose of limiting, as well actions for existing causes, as those which might afterwards accrue. They shall be sued within twenty years next after the cause of said action, and not after, that is, next after the accruing thereof. The language is not like that in *Williamson v. Field*, 2 Sandf. Ch. 568, cited by the plaintiff, "after such action *shall* accrue," which was held in that case to refer to such action as should thereafter accrue; and the distinction was taken between these words and the terms "next after such action accrued," which might leave the act to operate upon past as well as future causes.

There is nothing in the cases cited by the plaintiff which seems to require any other construction to be given to this act than the one we have now indicated. It is true, that the general principle of construction of statutes is, that they are to be construed to operate prospectively only, unless there be something in their terms clearly indicative that a retrospective operation was intended. This is clearly stated in *Dash v. Van Kleeck*, 7 Johns. 477; *Murray v. Gibson*, 15 How. 421; and they add, that statutes are never to be construed to work a destruction of a right before attached—to retrospect to take away vested rights. The turning point of many of the cases cited by the plaintiff was, that to give the act a retrospective operation would defeat vested rights. In *Sayre v. Wisner*, 8 Wend. 661, the time of limitation had already expired when the act was passed. So in *King v. Tirrell*, 2 Gray, 332; *Eakin v. Raub*, 12 S. & R. 331; *Thompson v. Alexander*, 11 Ill. 54; *Paddleford v. Dunn*, 14 Missouri, 519.

The general doctrine to be gathered from the decisions, both English and American, is, that the courts consider the language of these statutes of limitation, and make them retrospect, or otherwise, as the intention of the legislature is to be gathered

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from their language; *Fowler v. Chatterton*, 19 E. C. 75; S. C. 6 Bing. 258; *Nepean v. Doe*, 2 M. & W. 910; *Queen v. Leeds & Bradford Railway Co.* 83 E. C. L. 343, 550; *Patterson v. Gaines*, 6 How. 550; *Alabama v. Dutton*, 9 How. 522; *Morrison v. Smith*, 2 Pick. 430; *Penniman v. Rotch*, 3 Metc. 216; *Pierce v. Tobey*, 5 Metc. 168; *Stoddart v. Smith*, 5 Binn. 355; *Bolton v. Johns*, 5 Barr. 145; unless, by making the statute thus retrospect, a subsisting right would be barred, without giving the party any opportunity to sue. *The Queen v. The Leeds & Bradford Railway Co.* 18 Ad. & E. (N. S.) 343; S. C. 83 E. C. L. 343; 2 Mod. 310; 2 Atk. 36; *Noon v. Durden*, 2 Ex. Rep. 22.

We are of opinion, therefore, that the statute in question did retrospect upon the present cause of action, and was so intended. At the time of passing the act, seven years only had elapsed since the cause of action accrued, leaving to the plaintiff some thirteen years in which to bring her action, if she would do so, — a length of time so ample that it could with no propriety be called unreasonable.

The demurrer must be overruled, the plea sustained, and judgment be entered for the defendant for his costs.

6	564
18	280
6	564
127	153

WILLIAM WHIPPLE BROWN v. DANIEL FOSTER & others.

In debt on a prison limits bond, where the declaration sets out a breach of the bond by the escape of the prisoner, a plea of the discharge of the prisoner from jail under the poor debtors' act, containing new matter by way of confession and avoidance of the going of the prisoner beyond the limits, should not conclude, with a special traverse of the escape, to the country, but with a verification; and a replication to such plea, averring that no citation to the creditor was issued by the justices who granted the discharge, or was served upon the creditor, is not liable to objection, because the plaintiff did not join in the issue tendered by the special traverse, but attacked the validity of the discharge under which the prisoner justifies.

A certificate given by the justices to a poor debtor in the form prescribed by the statute is not conclusive, but *prima facie* evidence merely, that a citation was issued by the justices to, or was duly served upon, the creditor, notwithstanding the statute requires the justices "to examine the return of said citation, and if it shall appear to have been duly served," to administer the oath, &c., and notwithstanding the certificate states that the debtor "had caused the creditor at whose suit he was committed to be duly noti-

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fied according to law; " and hence, in debt upon a prison limits bond, it is a good reply to a plea setting up a discharge under the poor debtor's act, that no citation was issued to, or was served upon, the committing creditor.

A plea, concluding to the country where it should conclude with a verification, is defective in form merely; and such a defect, under the statute of amendments in Rhode Island, will not warrant a judgment upon demurrer against the defendants, but the court will order the conclusion to be amended.

In pleading a discharge of a prisoner under the poor debtor's act, it is necessary to aver, that a complaint was made by the debtor to the justice, that he had no property, &c., wherewith to support himself in prison and to pay prison charges, and asking to be admitted to take the poor debtor's oath, such complaint being necessary to give the justice jurisdiction of the subject-matter; after which, the certificate of discharge may be set out with a *taliter processum est*, and it is not necessary specially to aver the issue and service of citation to the creditor, or other proceedings necessary to be had in order to the granting of the certificate.

DEBT upon a jail bond, in the penal sum of \$3000, given by Daniel Foster, as principal, and by the other defendants, as his sureties, for the liberty to said Foster of the jail limits in the county of Bristol, the declaration in which set forth, as a breach of the condition of the bond, that the said Foster "did not, from the giving of said writing obligatory, and thenceforth, continue and be a true prisoner, in the custody, guard, and safe-keeping of Mary L. B. Pearce, keeper of said prison, and in the custody, guard, and safe-keeping of Stephen Johnson, his deputies, officers, and servants, or either or any of them, within the limits of said prison, until he was lawfully discharged therefrom, without committing any manner of escape or escapes during the term of his restraint, but, on the contrary thereof, that said Foster did, during the term of such his restraint, escape and go off and beyond the limits of said prison, without being lawfully discharged from such his commitment."

The second plea filed to the declaration alleged, in substance, "that after said Foster's commitment to the jail in Bristol County at the suit of the plaintiff, and before the escape in the declaration pretended, to wit, on the third day of August, 1858, at Bristol, two justices of the peace in said county of Bristol, to wit, Bennett J. Munroe and Massadore T. Bennett, delivered to the said Daniel Foster, then a prisoner in said jail committed on mesne process for debt at the suit of the plaintiff, and to whom the oath for the relief of poor debtors had then and there been administered according to the

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provisions of the statutes in such case made and provided, a certificate thereof, under their hands and seals, in the words and figures following, viz. :—

‘Bristol, *sc.* To Mary L. B. Pearce, keeper of the jail at Bristol, in the county of Bristol, and state of Rhode Island, &c.

‘We, the subscribers, authorized by the statute in such case made and provided, do certify, that Daniel Foster, of Warren, in said county, a poor prisoner confined upon mesne process in the prison at Bristol aforesaid, hath caused William Whipple Brown, of Providence, in the county of Providence and state of Rhode Island, &c., the party at whose suit he was confined, to be notified according to law of his, said Daniel Foster’s, desire of taking the benefit of an act entitled “An act for the relief of poor persons imprisoned for debt;” that in our opinions the said Daniel S. Foster has not any estate, either real or personal, except what is exempted from attachment by law, sufficient to support himself in prison, and that he hath not conveyed or concealed his estate with desire to secure the same to his own use, or to defraud his creditors, and that we have, after due caution to said Daniel Foster, administered to him the oath prescribed in the act aforesaid.

‘Witness our hands and seals, this third day of August, A. D. 1858.

(Signed)

‘BENNETT J. MUNROE, [L. s.]

‘Justice of the peace.

‘M. T. BENNETT, [L. s.]

‘Justice of the peace;’

that the said Daniel Foster, thereafterwards, to wit, on the same day, presented said certificate to the said Mary L. B. Pearce, keeper of said jail, and the said keeper forthwith discharged said Foster from his said commitment at the suit of the plaintiff; and the said Foster, thereafterwards, to wit, on the 4th day of August, A. D. 1858, did go off and beyond the limits of said prison, which going off and beyond said limits is the same escape and going off and beyond the limits aforesaid complained of in the plaintiff’s declaration; without this, that the said Foster did escape and go off beyond said limits in

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manner and form as in said declaration is alleged ; and of this they put themselves on the country," &c.

The third plea, filed by the defendants to the declaration, was, in substance, "that after the said commitment of the said Foster in manner as aforesaid, and on the same day, to wit, on the 27th day of July, A. D. 1858, to wit, at said Bristol, the said Foster, who was then imprisoned for debt on mesne process at the suit of said plaintiff, did complain to one Bennett J. Monroe, a justice of the peace in said Bristol, that he had no estate, real or personal, wherewith to support himself in jail or to pay jail charges, and did, then and there, request to be admitted to take the poor debtor's oath ; and the said Bennett J. Monroe did then and there issue a citation to said plaintiff, he being within this state, to appear at said Bristol, at the jail therein, on the third day of August, A. D. 1858, being the time and place by said justice appointed, to show cause, if any he had, why the said Foster complaining as aforesaid should not be admitted to take the poor debtor's oath ; and the said plaintiff then and there waived the service of the citation upon him according to the formalities required by the provisions of the Revised Statutes, ch. 198, § 3, and then paid to one ——— Pearce, to whom said citation had been intrusted by the justice aforesaid, and who then and there had the same in his possession, the sum of two dollars for the past and future board of said Foster until said third day of August, A. D. 1858, and the said Pearce, thereafterwards, on the same day, paid over said sum of money to the keeper of said jail ; and thereafterwards, on the return day of said citation, to wit, on the third day of August, A. D. 1858, to wit, at said Bristol, at the jail therein, at nine o'clock in the evening of the same day, Bennett J. Monroe and Massadore T. Bennett, two justices of the peace of the county of Bristol, where said Foster was committed, did examine the return of said citation, and it appearing to them to have been duly served did administer to said Foster the oath provided in the Revised Statutes, ch. 198, § 11, for the relief of poor debtors ;— the said justices, after a full examination of said Foster under oath, and hearing the parties, thinking it proper so to do ; and the said Foster having then and

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there first made an assignment of all his estate of every kind, and wherever the same might be, except what was exempted from attachment by law, to the said keeper of said jail and her successors in said office, and her heirs and assigns, in trust, for the benefit of all his creditors in proportion to their respective demands; and the said justices, then and there, after the oath had been administered as aforesaid, did deliver to said Foster a certificate thereof, under their hands and seals, in the words and figures following, viz.: as in the second plea; and the said Foster, thereafterwards, to wit, on the same day, at said Bristol, did present said certificate to said keeper of said jail, and the said keeper did forthwith discharge said Foster from his said commitment at the suit of the said plaintiff, as appears from the discharge on said jail book, a true copy whereof is annexed to, and made part of, this plea; and the said Foster did, thereafterwards, to wit, on the fourth day of August, A. D. 1858, go off and beyond the limits as aforesaid, which going off and beyond the limits of said jail is the same escape and going off and beyond said limits in said plaintiff's declaration complained of; without this, that said Foster did escape and go off and beyond the limits of said jail in manner and form as the plaintiff hath above thereof complained; and of this," &c.

The fourth plea was the same as the third, except that it stated that the citation to the creditor, issued by the justice, "was, then and there, to wit, on said twenty-seventh day of July, A. D. 1858, duly served on the plaintiff," and that it stated, that the examination of the poor debtor took place, at six o'clock in the evening of the third day of August, 1858, instead of nine o'clock in the evening of that day, as stated in the third plea.

To these pleas, the plaintiff replied, in substance, "that there was no citation issued to the plaintiff to appear and show cause why the said defendant, Daniel Foster, should not be permitted to take the oath in said second, third, and fourth pleas mentioned, in manner and form as the defendants have above thereof in said second, third, and fourth pleas alleged; and this the plaintiff prays may be inquired of by the country," &c.

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He further replied, to the second and fourth pleas, "that the said citation in those pleas mentioned was not served upon the plaintiff in manner and form as the defendants have above thereof in said second and fourth pleas alleged; and this the plaintiff prays may be inquired of by the country," &c.

To these replications the defendants demurred; assigning for causes of demurrer, that the plaintiff, by his said replications hath not taken issue upon said pleas of the said defendants and upon the denial therein contained, that is to say, that the said Foster did not go off and beyond said limits in manner and form as in said declaration is alleged, but has stated and put in issue in said replications, that said citation to said plaintiff was not issued, and was not served upon the plaintiff in manner and form as in said pleas is alleged; whereas, every matter and thing in said pleas stated, as to said citation and the service thereof upon the plaintiff, was stated as inducement; and also, for that said replications are, in other respects, uncertain, informal, and insufficient.

The plaintiff joined in demurrer.

Brownell, with whom was *Blake*, for the defendants.

The 1st replication to the 2d, 3d, and 4th pleas of the defendant alleges, that there was no citation issued to the plaintiff to appear and show cause why the said Foster should not be permitted to appear and take the oath, &c. The 2d, 3d, and 4th pleas set forth the certificate of the justices, and facts sufficient to show their jurisdiction in the premises, and allege the discharge of Foster by the jailer, on the authority of the certificate, and by virtue of the statute, and his subsequent going beyond the limits. All the above facts are set forth by way of inducement, and the pleas deny specially the breach of the condition of the bond set up in the declaration, to wit, that the defendant did go off of and beyond the limits in manner and form as therein charged.

1. The 1st replication to these pleas, therefore, instead of joining issue, traverses one of the allegations in the inducement of the pleas; thus making a traverse upon a traverse. The facts set forth in the inducement are only an *indirect* denial of the alleged breach set out in the declaration, while the denial, under

the *absque hoc*, is a *direct* and sufficient denial of the alleged breach. When the denial under the *absque hoc* is sufficient in law, the inducement cannot be traversed. Stephen on Pl. p. 188.

2. The 2d, 3d, and 4th pleas show a legal discharge, under the provisions of the Revised Statutes for the relief of poor debtors. The 1st replication to these pleas seeks to avoid the legality of this discharge, by alleging, that no citation was issued to the plaintiff as committing creditor to appear and show cause why Foster should not be permitted to take the oath. The plaintiff cannot deny in this suit the fact that a citation was issued, in conformity with the provisions of the Revised Statutes, ch. 198, §§ 2, 3. The statute provides for the issuing of a citation to the committing creditor, as a means of notification to him of the pendency of the application. It was the duty of the justices who heard the application of Foster, to examine the citation and return thereon, and see if it had been duly served upon the committing creditor, and to pass upon this question, before proceeding to the examination of the applicant. Rev. Stats. ch. 198, § 10. The determination of this question was a matter submitted to their judgment by the statute. A power to hear and determine is jurisdiction. *Angell v. Robbins*, 4 R. L. (1 Ames) 493, and cases cited. If the citation appeared to them "to have been duly served," they were authorized to proceed with the hearing. Rev. Stats. ch. 198, § 10. The *fact* to be determined in this case was, whether or not the committing creditor had been duly notified to appear and show cause why the relief asked for by Foster should not be granted. If, in fact, there was a citation in the hands of the justices at the time of the hearing, and notice had been given to the creditor in any form, either by a strict compliance with the statute, or informally, in consequence of a waiver of the formalities of the statute on his part, the creditor was "duly notified," and the justices would be justified in so deciding. The justices, to whom the determination of this question was committed by the statute, have decided it, and have certified that the said Foster had caused the said Brown "to be notified according to law" of the desire of said Foster for the relief provided for by the statute. See the certificate of the justices in the second plea.

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The determination of the justices on this point is conclusive, and cannot be reviewed in a collateral proceeding. It is immaterial upon what testimony they came to this conclusion. The matter was solely within their jurisdiction, and can only be reviewed in a direct proceeding authorized by law for that purpose. *Angell v. Robbins*, 4 R. I. (1 Ames) 493, 504; *Agry v. Betts*, 12 Me. (3 Fair.) 415; *Carey v. Osgood*, 18 Me. (6 Shep.) 152; *Baker v. Holmes*, 27 Me. (14 Shep.) 153; *Lowe v. Dore*, 32 Me. (Red.) 27; *Waterhouse v. Cousins*, 40 Me. (Heath.) 333; *Haskell v. Haven*, 3 Pick. 404, 406; *Woods v. Boldgett*, 15 N. H. 571; *Carter v. Miller*, 12 Verm. 513.

3. The second replication to the second and fourth pleas of the defendant alleges, that the citation was not served upon the plaintiff in manner and form, &c. This replication is equally bad, for each and all of the reasons above given.

James Tillinghast, for the plaintiff.

1. All the pleas are bad for concluding to the country, when they should have concluded with a verification. In each, new matter is alleged, any material fact of which the plaintiff had the right and ought, by the defendants concluding with a verification, to have been furnished the opportunity to traverse or answer over to; for each of these pleas admits the breach set forth in the declaration, but justifies under the discharge of the justices, and they are not simple traverses of the declaration. The plaintiff is for this defect, therefore, entitled to judgment on this demurrer.

2. At any rate, the conclusions of these pleas being erroneous, the plaintiff was justified in passing them by and tendering at once material issues which the defendants were bound to accept, and it is not for them to demur because the plaintiff has thus treated their pleas as correct and waived their informality in this particular. To have done otherwise would only uselessly have delayed the cause, to have come to the same result, finally. For had the plaintiff specially demurred as he might, the court would not have entered judgment in chief on such demurrer, but merely have ordered an amendment by adding the verification; *Ellis, Adm. v. Appleby*, 4 R. I. 469; and then the plaintiff would have replied over as now.

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3. But beyond this, these pleas themselves are defective. They all justify — confess and seek to avoid — under the proceedings of a tribunal of limited jurisdiction. Everything therefore essential to show its jurisdiction should be averred. *Frary v. Dakin*, 7 Johns. 75, and cases cited. Nothing will be presumed in favor of such jurisdiction. *Bowker v. Porter*, 39 Maine, 505, per Appleby, J.; *State v. Hartwell*, 35 Ib. 129, and cases cited below.

4. To examine these pleas in order. 1st. The 2d plea states no facts tending to show the jurisdiction of the justices — does not even contain the *averment* that they *had jurisdiction*. It evidently relies upon the *conclusiveness* of the *justices' certificate*. But it is by far the better opinion that the certificate is not conclusive of any facts necessary to confer jurisdiction, except, perhaps, (as in *Angell v. Robbins et al.* 4 R. I. 493,) of such facts as by statute are to be determined by the *judgment* of the *justice* upon *proof* of matters, *not of record*, to be submitted to him. Such in fact appears to be the rule of this court. Compare *Cushing & Walling v. Briggs et al.* 2 R. I. 139; *Eastwood v. Schreder*, 5 Ib. 388. This, too, is the well-settled rule in Massachusetts; *Slasson v. Brown*, 20 Pick. 436; *Ward v. Clapp*, 4 Met. 455; *Young v. Capen*, 7 Ib. 287; *Baker v. Moffat*, 7 Cush. 259; *Webster v. French*, 11 Ib. 304; *Hobbs v. Fogg*, 6 Gray, 251; *Park v. Johnson*, 7 Cush. 265; and in New Hampshire; *Osgood v. Hutchins*, 6 N. H. 374; *Banks v. Johnson*, 12 Ib. 445; *Woods v. Blodgett*, 15 Ib. 569; and this, too, though the statute makes it equally obligatory for the justices to examine — be satisfied with — the sufficiency of the notice, as does our own. Compare Mass. Rev. Stat. of 1836, ch. 98, §§ 8–10, p. 597; Ib. Gen. Stat. of 1860, ch. 124, §§ 21, 22, p. 636, 637; N. Hamp. Rev. Stat. of 1863, ch. 213, § 3, p. 548. More than this, it is *nowhere* held that the certificate is *conclusive* (even if *prima facie*) proof of jurisdiction, so far as depending on any facts not recited in it. See *Knight v. Norton*, 3 Shep. (15 Maine) 337; *Williams v. Burrill*, 10 Shep. (23 Maine) 144. Now this 2d plea and the certificate embodied in it shows that the justices had no jurisdiction, and that the discharge was void. *Knight v. Norton*, 3 Shep. 337; *Webster v. French*, 11

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Cush. 304; *Simpson v. Bowker*, 11 Ib. 306. 2d. The third plea is defective. The waiver of the service of the citation is not sufficiently averred. As it stands in this plea, it is an averment merely of a conclusion of law, or at most, of mixed law and fact, and as such is bad. 1 Chitty's Plead. 539, 540, (Springfield ed. 1844); *Frary v. Dakin*, 7 Johns. 75; unless, indeed, this plea can be construed as setting up the fact of *payment of board* by the plaintiff, as the *only* waiver relied upon; in which case it is bad as such payment, particularly as alleged here. It not being averred to have been demanded by or paid to any officer authorized to demand or receive it, or even that any officer, then or ever, had the citation, it is no waiver. The payment, if the creditor wishes to save his rights for a hearing and examination, is compulsory *immediately on service*. Rev. Stats. ch. 198, §§ 4-8; and the creditor cannot know, and is not bound to take the risk of deciding on the moment, whether the preliminary proceedings have been regular, — whether the citation is in proper form, or is then in the hands of a proper officer for service, or is in fact properly served, &c. &c. To thus construe the statute and give this effect to this forced payment would make it a mere trap to catch the creditor. See per *Bigelow, J.*, in *Baker v. Moffat*, 7 Cush. 262; *Webster v. French*, 11 Ib. 304; *Simpson v. Bowker*, 11 Ib. 306; *Knight v. Norton*, 3 Shep. 337; *Young v. Capen*, 7 Met. 287; *Hanson v. Dyer*, 5 Shep. 96; *Park v. Johnson*, 7 Cush. 265; see also the other above cases, where the discharge has been held invalid for defects in matters preceding the return of the citation. 3d. The 4th plea is defective for not sufficiently alleging any service of the citation: as alleged, it merely avers a conclusion of law, or mixed law and fact. It does not even show it in the hands of any officer for service. Chit. Plead. *supra*; *Frary v. Dakin*, 7 Johns. 75; and other cases cited above.

BRAYTON, J. The first point made by the defendant in the argument of this demurrer is, that all the facts set forth in the plea are alleged by way of inducement only, and as the inducement is followed by a special traverse of the breach alleged in the declaration, the plaintiff is not at liberty to traverse any portion of the inducement, and must join in the issue tendered

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by the special traverse. The declaration setting out the condition of the bond, that the debtor should remain a true prisoner in the custody, &c., until he should be lawfully discharged, without committing any manner of escape or escapes during the term of his restraint, alleges for breach, that during the time of his restraint he did escape and go off and beyond the limits of said prison, without being lawfully discharged from such his commitment. The rule referred to by the defendant, and of which he claims the benefit, requires, that the matter of the inducement should not only be in substance a sufficient answer to the last pleading, but should not contain a direct denial, nor be in the nature of a confession and avoidance; the special traverse being necessary or proper only because the inducement, while it furnishes a substantial answer to the prior pleading, contains no direct denial. Stephen on Pl. 179. The defendants' plea alleges, that before the pretended escape, two justices of the peace had administered to the prisoner the poor debtor's oath, and that, thereupon, they gave him a certificate that he was discharged from imprisonment, and that, thereafterwards, he went beyond the prison limits, which is the same escape and going off and beyond the limits, complained of in the declaration. By this plea, the departure on a day certain from the prison limits, and out of the custody of the jailer and officers, is admitted, and is sought to be justified by the debtor's having been admitted to take the poor debtor's oath; and in alleging that this is the same escape alleged in the declaration, the plea, in effect, traverses that he escaped at any other time. The plea denies any escape except that which is justified; and that is admitted and avoided by the matter set up in the plea. There seems then to be no necessity for any further traverse, special or otherwise; certainly not, in order to obviate any objection that the plea otherwise would be argumentative. Com. D. Pl. G. 3; 1 Saund. 22, n. 2, 209, n. 8; Gould on Pl. ch. 7, § 34. In *Inglebath v. Jones*, Cro. Eliz. 99, the action was for words spoken in London. Plea, words at Essex; and an accord and satisfaction for all actions, &c., everywhere, except London. Replication, words at London, *absque hoc* that there was any such accord. Demurrer, and objection to the replication, that it trav-

ersed the inducement to the defendant's traverse. The traverse was held good; and it was said that the plaintiff hath the election to maintain his declaration that the words were spoken there and join issue, or he may by general words maintain his declaration and traverse that which is falsely alleged to take from him his action, and he is received to which plea he chooses. In *Paramour v. Varrold*, Cro. Eliz. 418, the case was, false imprisonment in London. Plea, that the defendant was sheriff in Kent, and the recovery of judgment in Sandwich court, in Kent, and that by virtue of a *capias* awarded thereon he imprisoned the plaintiff at Sandwich; *absque hoc* that he was guilty at London. Replication, imprisonment in London; *absque hoc* that there was any such record; demurrer to the replication; and it was held, that the plaintiff might traverse the recovery of judgment, and for the reason before given, — that the alleged authority may be *false*, and if he must join on the issue tendered and could not deny the authority, he would, by the falsity of the defendant's justification, be deprived of a right which the law gives him. So it is said of a trespass, if defendant pleads a justification on a particular day, with a traverse that he is guilty on any other day, the plaintiff may pass by the defendant's traverse, and traverse the matter of justification; and because the day mentioned in the justification may be the day of the trespass complained of and yet the justification may be false, if the plaintiff could not deny the justification, he must be defeated in his action though his rights were complete. Hob. 104; Com. D. Pl. G. 18; 1 Saund. 21, 22, 23; Gould on Pl. 7, § 48.

In the case before us, the plaintiff, unless he can by the allegations contained in his replication avoid the discharge set up in the plea, must, or might, as in the case just stated, fail in his action, though the discharge was in fact utterly void and furnished no justification whatever to the defendant. This plea is not only traversable in this particular, but is faulty in its conclusion. Every pleading containing new matter which goes in avoidance of what is before pleaded must be followed by a verification, and must not conclude to the country. It is necessary that the pleading be kept open, in order to allow the other party to answer by new matter of his own, or other-

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wise to traverse ; and had the plea in this case not been by way of confession and avoidance, or had it not contained in the inducement any direct denial, and the special traverse thereon had been proper and necessary, the rule requiring the new matter set up in the plea to be left open would be the same. A conclusion to the country in a special traverse, says Stephen, page 181, is a novelty. The conclusion has always been with a verification till the rule of court, 4 W. IV. Another point made under this demurrer is, that the certificate, given by the justices in the form prescribed by the statute and as set forth in the plea, is conclusive evidence that the citation issued to the creditor and was served upon him in one of the modes prescribed in the statute, and that the plaintiff is estopped to aver that no citation was issued, or that it was not served upon the plaintiff, or that the plaintiff in fact was not notified of the time and place appointed to examine the debtor. The certificate given by the justices states, as is required by the act, that the debtor "had caused the creditor at whose suit he was committed, to be duly notified according to law," &c., and this is claimed as conclusive evidence that citation issued and was served upon the creditor. Whether the certificate is evidence of anything stated in it to have been adjudged and determined, depends upon the question whether the justices had jurisdiction to adjudge and determine. To this end, it is necessary that they should have jurisdiction not only of the subject-matter, but also of the persons of the parties to be affected. This question of jurisdiction is one which is always open whenever a judicial determination is offered as a ground of action or of defence, and the preliminary inquiry in every such case is, was the tribunal clothed with power to judge and determine ?

The statute in this case provides, that upon the complaint of the debtor that he has no property, &c., and his request to be admitted to take the oath prescribed, the justice shall issue a citation to the creditor,—that it shall be served by an officer either by reading it to the creditor, or by leaving an attested copy thereof at his usual place of abode seven days at least before the time appointed for the hearing. The issue of such citation and the service of it upon the creditor are necessary to

give the justices jurisdiction of the creditor; and the justices have no right to proceed and decide upon his rights, until he has been thus notified to appear and be heard.

The statement in the certificate of the justices, that the debtor had caused the committing creditor to be duly notified, though required by the act to be made in the certificate, has not been held to be conclusive evidence that the statute notice had been given. It has been held, at most, as *prima facie* evidence of that fact, open to be rebutted by proof that no such notice was in fact given. *Knight v. Norton*, 15 Maine, 337; *Wood v. Blodgett*, 18 Ib. 569; *Williams v. Burrill*, 23 Ib. 144; *Banks v. Johnson*, 12 N. H. 445.

The defendant claims that upon other language of the statute, jurisdiction is given to the justices to determine the question of notice. The act provides, that at the time and place appointed, any two justices may "examine the return of said citation, and if it shall appear to have been duly served, may administer the oath," &c.; and it is claimed that by this language the magistrates are made the sole judges as to whether the citation issued or was served upon the creditor, and that the certificate embodies their judgment that a citation was issued and served. Some of the cases cited from Maine apparently support this view. Had the justices who granted the certificate in this case examined any return of a citation issued to the creditor, and had thereupon determined that it appeared to have been duly served, the case would have been supported by the case of *Agry v. Betts*, 12 Maine, 415; *Carey v. Osgood*, 18 Ib. 152, and *Waterhouse v. Cousins*, 40 Ib. 333. In all these cases it appeared from the record of the justices that they examined the return of the notification, and that it appeared to them to be duly served. It may be said with some plausibility at least, that the justices had adjudged the return sufficient, assuming that there was a citation and return thereon, — that they exercised their judgment upon a state of facts contemplated by the act. That state of facts was, in the contemplation of the statute, that a citation had been issued by the justice to whom complaint had been made and had been served by an officer in some mode, and that he made return of his

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doings thereon. This state of facts at least was necessary to be shown before it could appear that the justices were entitled to form any opinion, or to do any act whatever towards an examination of the debtor. The power of the two justices commenced from that, and not before. Their jurisdiction in fact depends upon the service of a citation upon the creditor, and before the adjudication of the justices can be allowed to have any effect, it must appear, that the creditor had the notice required. There is nothing in the act which renders it necessary to depart in any degree from the great principle which lies at the foundation of all legal proceedings, that no man shall be bound by any judgment or determination of which he has had no notice which would give him an opportunity to be heard. By a series of cases the courts of Massachusetts have held that such notice is necessary to the validity of any proceeding by the justices to administer the oath to any person applying therefor, and that their certificate stating that due notice had been given, — though it is *prima facie* evidence of such notice, — is not conclusive upon that point, but that the court may look behind the certificate into any irregularity of the justices in their proceedings, and if the citation be not directed to the proper party, as in *Slasson v. Brown*, 20 Pick. 436, or if only one of several partners, creditors, was notified, as in *Putnam v. Longley*, 11 Pick. 489, the proceedings were void. In *Park v. Johnson*, 7 Cush. 265, the certificate was held void because the return of the officer did not show that the citation had been served sufficiently early. These decisions are made under a statute which requires a statement in the certificate that due notice has been given, and also requires, by language as strong at least as that contained in our act, that the justices be satisfied, before granting the certificate, of all the facts required to be certified. They proceed, however, upon the ground, that the question of jurisdiction is always open, and that every jurisdictional fact may be put in issue and must be established by proof before the judgment itself can be allowed any effect; and this undoubtedly is the rule of law. The replication in this case is not objectionable therefore that it alleges that no notification was issued to the creditor, that being a fact which must be estab-

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lished in order to make the discharge valid, nor is it objectionable that it alleges that it was not served upon the plaintiff, that being also a fact to be established. The replication therefore must be sustained and the demurrer overruled.

But the plaintiff claims that the pleas of the defendant, replied to by the replications to which the demurrer is filed, are bad and insufficient, and asks for the same judgment thereon as if he had himself demurred thereto.

The conclusion of these pleas to the country, instead of concluding with a verification, being matter of form rather than of substance, will not, under the ruling in *Appleby v. Ellis*, 4 R. L. 462, warrant a judgment against the defendants; but the court will order the conclusion to be amended.

A further objection made by the plaintiff is, that the pleas do not show jurisdiction in the justices, and that when a party seeks to justify under the proceedings of a tribunal of limited jurisdiction, everything essential to their jurisdiction should be averred. The objection is made mainly to the defendant's second plea, which it is objected is defective because it does not state that a citation issued to the creditor, or was served upon him, or that the debtor complained to the justice "that he had no property," &c. wherewith to support himself in jail. The case relied upon by the plaintiff is *Frary v. Dakin*, 7 Johns. 75.

The rule announced in that case is, that in pleading the judgment of an inferior court, it is sufficient to state such parts only as show jurisdiction in the court, and you may then conclude with a *taliter processum est*, setting forth the judgment. There are many examples of pleading a discharge of the nature here set up. If they are to be taken as illustrations of the rule of pleading, it is only necessary to aver such facts as show the *subject-matter* to be within the jurisdiction of the court. *Doe v. Parmenter*, 2 Lev. 81; *Marks v. Upton*, 7 T. R. 301; *Ladbroke v. James*, Willea, 199; *Rowland v. Veale*, Cowp. 18; *Cotterel v. Hook*, Dougl. 97; *Turner v. Beale*, 2 Salk. 521; *Paris v. Salheld*, 2 Wils. 139; *Service v. Heermance*, 1 Johns. 91; *Preble v. Kettle*, 2 Ib. 363; 7 Ib. 78; 1 Ld. Raym. 80; 2 Mod. 195. It is said by the court in 2 Lev. 81, "it is well enough to set

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forth a plaint levied ;” and in Cowp. 18, Ld. Mansfield said, the plaint is set out in Levinz, 176, in the same general way, and so in Lilly’s Register, 195, and so in Lutwyck, 914, and holds it sufficient, without averring process, to proceed directly to set out the judgment. And in *Ladbroke v. James*, Willes, 199, it is said, that if it had appeared that the sessions had jurisdiction, it would have been sufficient to have said generally that the sessions discharged him, and they would not inquire into any fact necessary to obtain the discharge, of which the sessions were the only judges. In *Adams v. Freeman*, 3 Wilson, 5, it appeared that a plaint was levied, and the objection upon demurrer was, that it did not appear that any summons issued ; but the court said, *taliter processum est* was sufficient, and they would presume everything regular below. Indeed, there is no case in which it is held that it is necessary to aver a summons or notice to the other party. In *Turner v. Beale*, 2 Salk. 521, the objection taken upon demurrer to the plea was, that although it showed that the subject-matter was within the jurisdiction of the justices, yet that it did not appear that the party petitioned them ; and the plea was overruled for that cause. It was said in that case by Holt, that the sessions cannot inter-meddle but upon application. The plaint in this case was wanting to give the court jurisdiction. “The plaint,” (in the language of Ld. Mansfield in *Rowland v. Veale*, Cowp. 18,) “is in the nature of an original writ. *A. E. queritur v. C. D. de placito transgressionis.*” It is the complaint upon which relief is prayed. In the case cited by the plaintiff, 7 Johns. 75, the plea was overruled because it did not appear that the application made to the judge was made by the insolvent in the mode prescribed by statute for making such applications, viz.: that three fourths in value of his creditors should unite in the application or plaint, and the court held that without it the judge had no jurisdiction. He had no general jurisdiction over insolvents, but only a limited one. This case follows the rule announced in 1 Johns. 91, *Service v. Heermance*, that it was sufficient to set forth the plaint, and thereupon to say *taliter, &c.* In that case it was alleged that the debtor’s petition was joined in by three fourths in value of the creditors, and the court held

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that allegation to be sufficient to give jurisdiction, and to show that the plaint was made in conformity to the statute.

The second plea of the defendant does not aver that any complaint was made to the justice that the debtor here had no property, &c. wherewith to support himself in prison, and asking to be admitted to take the oath, and for this defect the second plea must be overruled.

There is no such defect in either the third or fourth pleas. They both show the plaint made which the statute requires, and those pleas must be sustained.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
FOR THE
COUNTIES OF NEWPORT AND KENT,
DURING THE SPRING CIRCUIT, 1861.

PRESENT:

HON. SAMUEL AMES, CHIEF JUSTICE.
HON. GEORGE A. BRAYTON, } JUSTICES.
HON. ALFRED BOSWORTH, }

COUNTY OF NEWPORT, FEBRUARY TERM, 1861.

THOMAS HALEY v. THE NEWPORT GAS LIGHT COMPANY.

A plaintiff, who brings his action originally in the supreme court for the sum of one hundred dollars or upwards, will be entitled to costs, although the defendant, by a tender in court, has reduced the sum for which judgment is rendered below that amount.

ASSUMPSIT by the plaintiff, as master of the Brig *Defiance*, for the freight of a cargo of Pelton gas coals from Newcastle upon the Tyne to Newport; the declaration including also a claim for £5, as a customary gratuity to the master.

At the trial of the cause before Mr. Justice *Bosworth*, under the general issue, it appeared that the contest was, whether by the charter-party and bill of lading, the freight, which was £19 per keel of eight Newcastle chaldrons, was to be computed upon the custom-house or outtake measure, or according to the number of keels taken on board, or intake measure. The defendant had tendered in court, with interest and costs, the sum of \$1341.36, being the amount of freight computed in the latter mode, which the court sustained as the proper mode of computing it, but had neglected to tender the amount of the gratuity to the master, which, with interest, amounted to \$22.42. In awarding to the plaintiff judgment for this latter amount, the defendant objected that the action having been originally brought in this court, and the judgment being for less than a hundred dollars, the plaintiff could, under the provision of ch. 164, § 20, of the Revised Statutes, recover no costs.

Van Zandt & Rice, for the defendants.

AMES, C. J. Literally, a plaintiff may be said to "recover" in his action that sum which the defendant admits to be due and tenders in court, as well as that for which the court renders judgment; and to deprive him of costs when his action was properly brought here according to the admission and tender of the defendant, would certainly defeat the spirit of our statutes relating to costs at law, including that upon which this objection is founded. We cannot listen to the argument, that the defendant, by admitting the larger portion of the plaintiff's claim, and causelessly disputing a small portion only of it, may compel the plaintiff, at the loss of an arrest or of an attachment, to commence *de novo* in another court, or certainly pay the costs of the further though successful prosecution of a suit, properly brought in this. It is true, that in the action before us the principal question was settled in favor of the defendants; but by omitting to tender all that was due upon the plaintiff's claim, they failed to bring themselves within the provisions of ch. 185, § 9, of the Revised Statutes, by virtue of which they might not only have avoided the costs of the further contest, but have recovered them against the plaintiff.

Let judgment be entered for the plaintiff for the sum of \$22.42, with costs.

 King v. Cole & another.

 COUNTY OF KENT, MARCH TERM, 1861.

LYDIA KING v. SAMUEL J. COLE & another.

Where an indefinite estate in land is given by a will, the imposition of the payment of a legacy upon the devisee, or of an annual charge upon him, or upon his estate, for a term which may endure longer than his life, will enlarge his estate into a fee, without regard to the disparity between the amount of the legacy or charge and the annual value of the land.

When a testator gives, indefinitely, a home in the homestead with sufficient firewood fit for use, to such of his daughters as shall remain unmarried at the death of their mother, who is also provided for by his will out of the homestead farm, the court will not supply words limiting their right to the period that they shall remain unmarried; there being nothing more to show that the testator intended to use words thus limiting it.

THIS was an action of trespass and ejectment, — the declaration containing two counts.

The *first* count averred an ouster, and sought to recover the possession, of a tenement in Warwick, being a portion of the real estate of which the plaintiff's father, Ephraim Arnold, died seised, consisting of the south-east front chamber, and the bed-room north of, and leading out of, said front chamber; of the north-east garret room and of the cellar under the front entry in the dwelling-house of said Ephraim, together with the right and privilege appurtenant thereto, to use the front and back stairs, and to use the well, the outbuildings, and the yard, attached to said dwelling-house.

The *second* count averred the plaintiff's ouster of an undivided tenth part of the homestead farm of her father, the said Ephraim Arnold, and claimed that she should be reinstated therein.

The case was submitted to the court at this term under the general issue, upon an agreed statement of facts, by which it appeared, that the plaintiff's father, the said Ephraim Arnold, died October 31, 1822, leaving a last will and testament, in which he says, amongst other things:

“ And such outward property or worldly estate as it has

6	584
7	274
6	584
28	182

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pleased God to bless me with in this life, I give, devise, bequeath, and dispose of the same, in manner and form following, viz. : " —

" *Item.* I give and bequeath to my beloved wife, Waity Arnold, one third part of my indoor movables that shall remain after payment of debts and expenses. I also give to my said wife one third part of my real estate, to have the privilege to improve the same so long as she shall remain my widow.

" *Item.* I give and devise my homestead farm and thatch lot to my four sons, namely, James Bentley Arnold, William B. Arnold, Simeon Arnold, Alven Sanger Arnold, to be equally divided, on this condition, that my said son Simeon Arnold pay as a legacy the sum of seventy-five dollars, to be equally divided amongst his five sisters, Hannah, Freelove, Mary Anne, Lydia, and Rebecca ; Simeon Arnold paying the above legacy in cash is to be entitled to an equal share with his other brothers, and not otherwise. " I also give to my son James B. Arnold my clock.

" *Item.* I also order my executor to take especial care that my five daughters all have an equal fitting out in furniture, as near as may be : the youngest to be made equal to the older, out of the money I have in Cranston and Pawtuxet Banks. I hold twenty-five shares in Cranston, equal to five hundred dollars. I also hold in Pawtuxet Bank fifteen shares, eighteen dollars paid on a share. If any money should be left after purchasing furniture, the same to be equally divided amongst the five daughters. If any of my daughters should remain single or unmarried at the decease of their mother, my will is, that they shall have convenient room in my house to occupy as a home, and that firewood sufficient for comfort be furnished them convenient for use ; my will is that my four sons furnish the same equally. I also give to my wife one cow, and the same to be wintered and summered ; and that said cow be delivered her for use when she thinks convenient, and that she be furnished with firewood cut convenient."

The testator's wife survived him, and died May 5th, 1841. His sons are all living, with the exception of Simeon, who died January 27, 1835, leaving issue, and who, in his lifetime, paid

the seventy-five dollars to his sisters, as required by his father's will; all the testator's daughters married before the death of their mother except Lydia, the plaintiff, who married Henry King, December 24, 1857, and by his death in 1859 became a widow.

The defendant, Samuel J. Cole, holds by conveyance all the title of the four sons of Ephraim Arnold to said real estate which they derived under the will of said Ephraim, the other defendant, his son being in possession of said real estate with him. The earliest of Cole's deeds to the estate reserves to the daughters of Ephraim Arnold "all their right, if any they have, which was given to them in said premises by their father Ephraim Arnold, deceased, in his last will and testament;" and the other deed contains the following reservation: "It is also reserved that Lydia Arnold," (the plaintiff,) "is to retain and have all the rights in said house and farm secured to her by the will of Ephraim Arnold." Before the purchase of the premises by the defendant, Samuel J. Cole, his grantors had united with the plaintiff, then unmarried, in a written agreement of reference to three referees, to set off and award to her such portion of the dwelling-house and messuage upon said farm as she was entitled to by the will of her father, and said referees reported in writing, awarding and setting off to her, as her portion of said dwelling-house, &c. the rooms and premises described and claimed in the first count of her declaration. Upon such award, the plaintiff entered upon and took possession of said rooms and premises, and was in the actual and exclusive possession of the same at the time of the purchase of the defendant, Samuel J. Cole; and the said defendant, for some time after his purchase, furnished the plaintiff, or in part furnished her, with firewood, as provided in said will, as his grantors had done before him.

Upon the marriage of the plaintiff with Henry King, in 1857, the plaintiff took up her permanent residence at his house in Cranston, but retained, and has always retained, and does still retain, the keys of said rooms; but both defendants, before the bringing of this suit, refused to allow her to enter the house or to have access to said rooms, except as stated below, though

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she has requested and demanded to be allowed so to do since the death of her husband. Soon after, however, after the marriage of the plaintiff, the defendants, or one of them, gave to her and to her husband a notice in writing that her right to said rooms had ceased upon her marriage, and requested her to remove her things, and offered to her access to said rooms for that purpose.

James H. Tillinghast, for the plaintiff.

Randall & Wm. H. Potter, for the defendants.

AMES, C. J. The scheme of this will is quite apparent: to give a third of the real estate of the testator, consisting of the homestead farm and a thatch lot, to his wife during widowhood, — to divide the remainder in fee amongst his sons, — to provide for his daughters with his money in bank, — and if any of them survived their mother unmarried, to give them a home and sufficient fuel at the homestead as a charge upon his sons, or upon their estates. The will itself, in its prefatory clause, professes to dispose of the whole estate of the testator; and this, though not enough to enlarge the estates of the sons, left indefinite, to a fee, against the settled meaning of the special devise to them, affords a sufficient key to the intent of the testator.

In conformity, however, to the technical rules of law appropriate to the construction of wills, this intent can well be carried out, in consequence of the condition imposed upon Simeon to pay as a legacy seventy-five dollars, to be divided between his five sisters, and of the annual charge upon the estates of all the brothers, of a home for their unmarried sisters who might survive their mother, and of sufficient firewood for such sisters and their mother. It has been long settled, that where a devisee, whose estate, as in this case, is undefined, is directed to pay a specific sum in gross, he takes an estate in fee, on the ground, that if he took an estate for life only, he might be damnified by the determination of his interest before reimbursement of his expenditure; and that the disparity of the sum imposed, to the value of the land, does not prevent the enlargement of the estate. 2 Jarman on Wills, 171, 172, and cases cited.

Under this rule Simeon certainly took an estate in fee; and the testator plainly declares, that there was to be, after this pay-

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ment, entire equality between him and his brothers. But if this were doubtful, the same principle applies to annual charges, whether upon real estate, or to be paid by the devisees, like the firewood to be furnished by the sons to their mother and unmarried sisters, which enduring for the widowhood of the former, and for the lives of the latter so entitled, might endure beyond the lives of the sons, if their estates were not thereby enlarged to a fee. *Ib.* 173, 174, and cases cited. In this view of the will of her father, the plaintiff is not entitled to recover under the second count of her declaration.

We do not see, however, upon what pretence the plaintiff's claim under the first count of her declaration can be resisted, coupling her right in the homestead under the will of her father, with the subsequent partition by which this right was ascertained and set off to her in severalty. We might, indeed, conjecture that the intent of the testator would be fulfilled by holding that this right, which was to accrue to the plaintiff upon her surviving her mother as a single woman, was to cease upon her marriage; but, as the testator has not chosen thus to limit it, but has left it indefinite and thus for life, we do not feel at liberty to supply such words of limitation, since we cannot say that the testator intended to use them. The plaintiff must therefore have judgment upon the first count of her declaration.

APPENDIX.

DECISIONS

OF JUDGES OF THE SUPREME COURT, ON APPEALS TO THE SCHOOL COMMISSIONER.

APPEAL OF SYLVESTER R. PEARCE & others.

Any resident of a school district, qualified at the time as a registered voter to vote in town meeting, is entitled to vote in the district meeting to assess a tax for the repair or improvement of the district school-house provided he be liable on account of his personal estate to contribute to the tax for which he votes, although he has never been assessed for such personal estate, and his name is not upon the last list of town voters.

APPEAL to the commissioner of public schools, from the vote of a district meeting of school district No. 2, Cranston, ordering a tax of \$500 to be assessed upon the ratable property of the district, for the purpose of repairing and improving the school-house in said district.

By the statement of facts of the commissioner, it appeared that the vote was passed at a district meeting held on the 21st of May, 1859, by eighteen affirmative, against sixteen negative, votes; and that the appellants contested the validity of the order of assessment by impeaching the right to vote, at said meeting, of Horatio N. Randall and Charles O. Bennett, residents in said district, both of whom voted in the affirmative. It further appeared from the statement, that Randall was in

September, 1858, assessed in the town of Cranston for town taxes, the sum of \$3.65, upon real estate valued at \$1200, which he paid to the town collector on the 8th day of March, 1859; and that having, in January or February, 1859, sold his real estate, he was in July of that year, assessed for town taxes in Cranston, the sum of \$1.07½, upon personal estate valued at \$500; — the same estate for which he was assessed for his proportion of the tax in question. Bennett's name, though upon the registry, was not upon the list of voters of the town of Cranston, prepared for the April or June election, 1859.

Upon these facts the commissioner decided that Randall was entitled to vote at the district meeting of the 21st of May, 1859, and that, consequently, the vote of assessment then passed was valid, and it was unnecessary to pass upon Bennett's right to vote at said meeting; whereupon, the commissioner was requested by the appellants to lay a statement of the facts before the chief justice for his opinion in matter of law.

AMES, C. J. By sect. 8, ch. 62, of the Revised Statutes, every resident in a school district is entitled to vote in a district meeting, who is qualified at the time to vote in a town meeting, with this further restriction, — that to vote upon any question of taxation of property, or of expenditure of money raised thereby, he must either *have* paid, or *be liable* to pay, a portion of *the* tax. He need not, however, be upon the last list of town voters; since such lists are not prepared or made up for district, as they are for town, meetings; and there is, therefore, no mode provided by which he could get upon the list, however well qualified he might be at the time to vote.

In this view of the statute, it is plain, that Randall was entitled to vote for the tax ordered to be assessed by the district meeting of school district No. 2, of Cranston, held on the 21st day of May, 1859. Though not upon the town voting list made up for the April election, 1859, he was qualified, as a registered voter, to vote at the meeting in question, by the payment of a tax to the amount of a dollar, upon property valued at a sum exceeding one hundred and thirty-four dollars, assessed within the year next preceding, and more than four days prior to the time of his voting; (Rev. Stats. ch. 22, § 1, ch. 23, § 14,) and although he had parted with the real estate upon

which *this* tax had been assessed, he was, on account of personal estate to the amount of \$500, liable to contribute to, and therefore entitled to vote for, the school district tax in question.

For these reasons I affirm the decision of the commissioner, that the vote of school district No. 2, of Cranston, passed May 21, 1859, was a valid order of assessment.

APPEAL OF JOHN W. BARNES.

The trustees of a school district may, subject to the control of the district meeting, lawfully permit the district school-house to be used, out of school hours, for the purpose of private instruction in vocal music of the district scholars and others residing in the district; and it is no objection to such use that the teacher is compensated by private subscription or otherwise.

By permission of the trustees of school district No. 1, in the town of Barrington, private instruction in vocal music was given by Mr. Christopher Roffee, out of school hours, in the district school-house; his scholars paying him a compensation therefor. At a special meeting of the tax-paying voters of the district, held pursuant to notice to act upon the subject, on the 3d day of February, 1860, it was moved, "that the district school-house be used for no other purpose than a public school-house, and district purposes;" but the motion was negatived. From this decision, John W. Barnes, a voter in said district who voted for the motion, appealed to the school commissioner, on the ground, that a district school-house could not be used for any purpose not connected with public education, without the general consent of the tax-paying voters of the district, and requested, that the commissioner would lay a statement of the facts before one of the judges of the supreme court.

AMES, C. J. I concur in the decision of the school-commissioner that *this* appeal must be dismissed.

By the Revised Statutes, ch. 65, § 1, the custody of the district school-houses and other district property is confided to the trustees of the districts; and the question submitted is, in sub-

stance, whether the trustees of district No. 1, in Barrington, by permitting a private teacher of vocal music to give instruction in his art in the district school-house, out of school hours, have exceeded their authority, or violated their trust. Our school system, with all the intellectual and material means for instruction provided by it, was designed to promote public education; and any use of the school property tending to this end, and which does not interfere with the regular schools, may be permitted by the trustees of a school district, as within the spirit of their trust. It is evident, that this power of the trustees, must, to answer its purpose, be in some degree discretionary and obedient to circumstances; and it certainly should not be interfered with, either by the district, or on appeal, by the commissioner, except when exercised in a manifestly improper manner. It is true, that the principal expense of the education contemplated by the school law is paid out of funds furnished by the state and raised by town and district taxes; but it is a mistake to suppose that these are the only means which the law employs to carry out its large design. By the six last sections of ch. 64 of the Revised Statutes, rates of tuition are provided, to be paid by those attending school, or by their parents, employers, and guardians; and by the 14th section of the same chapter, the trustees of a district may prescribe and collect a rate, in their discretion, sufficient to keep the school for the four months required by law, without any vote of the district.

In the appeal of Isaac Hall, decided in 1853 by Ch. Just. Greene, after consultation with Justices Haile and Brayton, the conclusion come to, was, that a district school-house might be used "for educational purposes collateral to the main purpose; such as, meetings of the district for school business, lectures upon literary and scientific subjects, debating societies for the people or children of the district," &c.; and they approve the above language of the then commissioner, Hon. E. R. Potter, in giving his decision on that appeal.

This opinion certainly includes, as within the power of the trustees and the district, the right to license the use of a district school-house, for private instruction, out of school hours, in vocal music. Instruction in this art, is quite commonly furnished in our public schools, to enable the children to join in an exer-

cise always agreeable to them, and to fit them to participate in one of the ordinary acts of public devotion. The use of the school-house, when not needed for the regular course, that the like instruction may be imparted to the scholars and others of the district, so that the knowledge and taste of all in this excellent accomplishment may be promoted, is quite in accordance with the uses to which such property is appropriated by law ; and the last objection which a friend of public education should make to such a use is, that the people of the district are so desirous of such instruction, that they are willing to pay for it themselves.

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ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

1. Where an assignor excluded from a preference under *his* assignment those of his creditors who had received, or were entitled to receive, a dividend upon their claims against him under *any other* assignment, he was held not to intend to exclude from his preference those of his creditors by promissory note, who, by neglecting to release a prior assignor who had indorsed his notes, were thrown into such a class under another assignment, that, to his knowledge, when he executed his, they could not possibly receive any dividend under the other. *Nightingale & another, Assignees, v. Smith & others*, 308.

2. To meet acceptances of his commission agents, advanced to him on consignments, the assignor had purchased with his checks on banks and remitted to his agents, bankers' drafts on short time, indorsed by him. His checks not being paid, the bankers did not send funds to take up their drafts; so that the agents had to provide for their acceptances out of their own funds; and the result, at the time of the assignment, was, that a balance of account was due from the assignor to them. The checks, drafts, and balance of account were all embraced, by description, in the first class of the assignment. *Held*, that the commission agents should receive a dividend under the assignment upon their balance of account, and the bankers on the amount of the checks, less the dividend received by the commission agents. *Ib.*
3. An assignment by an insolvent debtor in trust for the benefit of his creditors, with preferences to certain creditors on condition that they will release the assignor within a reasonable time limited in the assignment, is a valid trust in Rhode Island; and the rights of the creditors, as *cestuis que trust* under it, will be protected in equity against sale, under an execution against the assignor levied upon the assigned property subsequently to the assignment. *Nightingale v. Harris & Lippitt & another*, §21.
4. Such an assignment is not invalidated by the fact that it does not purport to convey all the assignor's property, if in truth it does convey all his property, except what is excepted by law from attachment. *Ib.*
5. Nor is it invalidated by the fact that it prefers certain creditors by giving one class thirty per cent., and another fifteen per cent. only on their claims, out of the assigned property, turning the balance over to the general creditors of the assignor, where it is plain, from the relative value of the property and the amount of the debts embraced by the assignment, that the assignor could not have designed or expected that any interest out of the assigned property would result to himself. *Ib.*
6. Nor is it to be held fraudulent and void under the statute of Rhode Island against fraudulent conveyances, merely because it appropriates in payment to creditors who have, under a former assignment, shortly before released the assignor without payment or upon partial payment, placing them upon an equality with non-releasing creditors; although the court will instruct the assignor to pay nothing out of the assigned fund upon the released claims. *Ib.*
7. An assignment in trust for the benefit of creditors, made in New York between citizens thereof, is held in that state to transfer to the assignee a debt due to the assignor in another state, without notice of the assignment to the debtor, provided the debtor be not prejudiced by want of notice; and hence, such an assignment, when prior in time to an attachment by foreign process of the assigned debt here, will defeat the attachment, especially when made by a citizen of New York, though the debtor had no notice of the assignment at the time he was served, provided, always, that he be not prejudiced by the want of notice. *Noble v. Smith*, 446.
8. A master appointed under ch. 164, sect. 17, of the Revised Statutes, to settle the accounts of a removed assignee, has jurisdiction over every question which goes to the charge and discharge of the assignee as an accounting party, though involving fraud in the performance of his trust; the act relating to

jury trials in equity causes having no application to summary proceedings in equity, upon petition. *Lowitz & Becker & others v. Alden, Assignee*, 512.

See CONTRACT, 4.

ATTACHMENT FOR CONTEMPT.

See DEPOSITIONS.

AUCTION SALE.

A purchaser at an auction sale, who when bid against expostulates with a rival bidder, informing him of his losses, and telling him that on account of them he ought not to bid against him, thereby causing the bidder to withdraw, and obtaining the land at a considerable undervalue, will not be allowed to retain the benefit of his purchase against a subsequent mortgagee of the land who seeks to redeem the mortgage under which the sale is made. *Fenner v. Tucker*, 551.

AWARD.

An action of covenant cannot be maintained upon a sealed agreement to submit, under a rule of court, a pending action and all matters in dispute to certain referees, for the non-performance of their award, though the award be established by judgment, unless the agreement of submission contain some stipulation to perform it; the remedy in such case, if it be one that the execution of a common-law court, out of which the rule issues, will not afford, being a remedy in law or equity suited to the case. *Sprague v. Hall*, 27.

BOND FOR LIBERTY OF JAIL-YARD.

1. Where a debtor was on the same day committed to jail upon two executions at the suit of the same creditor, upon each of which commitments he executed a bond with sureties for the liberty of the prison-yard, and within thirty days of his said commitments executed to the jailer but one assignment for the benefit of his creditors, *Held*, that he had complied literally, as well as substantially, with the requirement of sect. 4, ch. 197, of the Revised Statutes; and, although he did not return to close jail within said thirty days, had committed no escape upon either of his said bonds. *Farrington v. Allen & others*, 449.
2. In debt on a prison limits bond, where the declaration sets out a breach of the bond by the escape of the prisoner, a plea of the discharge of the prisoner from jail under the poor debtors' act, containing new matter by way of confession and avoidance of the going of the prisoner beyond the limits, should not conclude, with a special traverse of the escape, to the country, but with a verification; and a replication to such plea, averring that no citation to the creditor was issued by the justices who granted the discharge, or was served upon the creditor, is not liable to objection, because the plaintiff did not join in the issue tendered by the special traverse, but attacked the validity of the discharge, under which the prisoner justifies. *Brown v. Foster & others*, 565.
3. A certificate given by the justices to a poor debtor in the form prescribed by the statute, is not conclusive, but *prima facie* evidence merely, that a citation was issued by the justices to, or was duly served upon, the creditor, notwith-

standing the statute requires the justices "to examine the return of said citation, and if it shall appear to have been duly served may administer the oath, &c.;" and hence in debt upon a prison limits bond, it is a good reply to a plea setting up a discharge under the poor debtors' act, that no citation was issued to, or was served upon, the committing creditor. *Ib.*

4. A plea, concluding to the country where it should conclude with a verification is defective in form merely; and such a defect, under the statute of amendments in Rhode Island, will not warrant a judgment upon demurrer against the defendants, but the court will order the conclusion to be amended. *Ib.*
5. In pleading a discharge of a prisoner under the poor debtors' act, it is necessary to aver, that a complaint was made by the debtor to the justice, that he had no property, &c., wherewith to support himself in prison and to pay prison charges, and asking to be admitted to take the poor debtors' oath, such complaint being necessary to give the justice jurisdiction of the subject-matter; after which, the certificate of discharge may be set out with a *taliter processum est*, and it is not necessary specially to aver the issue and service of citation to the creditor or other proceedings, necessary to be had in order to the granting of the certificate. *Ib.*

BILL OF DISCOVERY.

See EQUITY, 15.

BILL OF EXCEPTIONS.

See NEW TRIAL, 4, 6.

BUTLER HOSPITAL.

1. The warrant of commitment of a justice of the peace, committing a person furiously insane, who is at large, to the Butler Hospital for the Insane, is not void because neither it, nor the judgment of the justice of the peace issuing it, states the town in which the lunatic was arrested, nor because they do not state, that no recognizance was offered on the part of the lunatic that he shall not go at large until sound of mind; the former statement being merely of what the statute directs for the guidance of the hospital in collecting payment for the lunatic's support, and the latter, a statement only of what is presumed, until the contrary appears, from the fact of commitment. *Town of Hopkinton v. Waite, Town Treasurer*, 374.
2. Such omissions, cannot, therefore, where the insane person is a pauper, avail the town in which he is settled, in defence to a suit to recover the amount paid for his support at the hospital, by the town in which he was arrested. *Ib.*
3. Prior to July 1, 1857, when the Revised Statutes went into operation, no such payments at the hospital, made by the town in which the lunatic pauper was arrested, could be recovered of the town in which he was settled; and if made, were voluntary and irrecoverable. *Ib.*

CHARTER.

See CORPORATION.

CHAMPERTY.

The payees of a note, who were New York stockbrokers, had received it from the defendant as collateral security for any balance which might accrue in their favor, in the course of his stock transactions, carried on through them; and a large balance, far exceeding the amount of the note, had accrued in their favor growing out of stock transactions not proved to be impeachable under the New York statutes against stock-jobbing and gambling in stocks. In this state of things the plaintiff, who was an execution debtor of the defendant, and for the purpose of attaching thereon in the hands of the plaintiff's attorney the amount which he might pay on the execution, received the note indorsed in blank by the brokers, after it was overdue, under a contract to sue it in his own name, with the right to take to his own use, at the rate of fifty per cent. so much of the judgment he should recover as he might wish to use,— he paying the costs of collection on what he might take,— and to transfer the balance of the judgment to the brokers; *Held*, in a suit on the note, that the transfer of the note could not be objected to by the defendant as void for champerty; and that, although the note was subject in the hands of the plaintiff to all the defences that it would have been, had it been sued by the brokers, as well from the character of the transfer as because transferred when overdue, yet that it was supported by the legal portion of their balance of account against the defendant, exceeding its amount, although a portion of the balance grew out of stock transactions carried on by them for the defendant in which the sellers had not the stock to deliver; there being no proof that a general scheme was entered into between the brokers and the defendant to violate, in their transactions, the laws of New York in regard to stock-jobbing and gambling, or that the brokers were cognizant, in the objectionable portion of the defendant's stock transactions, that the sellers had not stock to deliver. *Thompson v. Ide*, 217.

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See INSOLVENT ESTATE OF DECEASED PERSON.

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See SCHOOL COMMISSIONER.

CONDITIONAL LIMITATION.

See DEED, 2.

CONSTITUTIONAL LAW.

In Rhode Island, by Rev. Statutes, ch. 151, sect. 10, the power to authorize the sale of the real estate of infants, for any proper purpose, is conferred upon the courts of probate; and in cases within the spirit, though not within the letter of the statute, and in similar cases, the General Assembly is constitutionally competent to give to guardians and trustees special authority to sell the real estate of their wards and cestuis for proper purposes; this being the exercise of a legislative and not of a judicial power. *Thurston v. Thurston & others*, 296.

See SCHOOL COMMISSIONER, 2.

CONTEMPT.

See DEPOSITIONS.

CONTRACT.

1. A promise to pay a sum certain in consideration of a reciprocal promise to contribute a larger sum towards a contingent liability, in a negotiation interesting to both parties, is supported by a sufficient consideration. *Aldrich v. Lyman*, 98.
2. Where money is advanced to a third person for the use of the defendant, and at his request, or, to the defendant, upon the note of a third person, accompanied by the promise of the defendant to meet the note, the obligation of the defendant to repay the advance is primary, and does not require written proof, as if it were a promise to pay the debt of another. *Thurston, Gardner & Co. v. James*, 103.
3. Where the plaintiffs had advanced to the defendant the amount of a note of a third person, which the defendant had procured to be made directly to them, upon the defendant's promise to meet it at maturity if not collected of the maker, and instead of being collected it was sold by the plaintiffs, without the knowledge of the defendant, for less than its face: Held, that the subsequent approval by the defendant of the sale, and promise to pay the difference between the amount advanced upon the note and the proceeds of sale, was, as a ratification of the sale, equivalent to a prior authority to the plaintiffs to sell, instead of waiting to collect, the note. *Ib.*
4. An agreement by the holders of a promissory note to release the indorser of it upon condition of something to be done by the maker, cannot avail the indorser in defence to an action against him in the note, as a release by way of equitable estoppel, unless the condition, in the fair sense of the agreement, has been fully performed by the maker, although the non-performance of the condition is no way chargeable upon the indorser. *Whitcheer Bank v. Cushing*, 303.
5. Where a bank, holding an indorsed note, agreed with the maker and the indorser, that if the former, who had stopped payment, would prefer its claims against him, including the note, in the first class of his assignment with other banks, it would release the indorser, and the maker put the claims of the bank

nominally in the first class of his assignment with other banks, but really postponed them in payment to debts exceeding in amount, \$30,000; *Held*, in an action by the bank against the indorser, that the bank was not equitably estopped by the agreement from pursuing the indorser, inasmuch as the condition of the agreement had not been fairly performed by the maker, although without fault on the part of the indorser. *Ib.*

6. An agreement to pay money, procured by the plaintiff from those preferred in a will, by concealing, after the death of the testator and before probate, the place of its deposit, and by threatening to destroy it, is illegal and void; and finds no support in the fact, that the testator himself placed it in the hands of the plaintiff's son, and under the plaintiff's sole control, with full authority to the latter to use it for such extortion. *Walling v. Angell & others*, 499.

CORPORATION.

1. The charter of a manufacturing corporation provided, that "all executions that shall issue against said corporation shall be levied on the property of said corporation; and for want of such property, the stockholders who were such at the time the contract was made, or liability incurred, shall be liable in their own persons and estates, as if the contract had been made or liability incurred by them personally. Stockholders shall be holden as such, for all debts and liabilities incurred up to the time of the sale or disposal of their stock, and public notice thereof given in a newspaper printed in Newport." *Held*, that a judgment creditor of the corporation, whose execution had been returned wholly unsatisfied for want of corporate property whereon to levy the same, might maintain, for the recovery of his debt, against the living stockholders of the corporation liable to him, an action at law, as against joint contractors for the same, in the nature of copartners; and that this, in such a contingency, was his appropriate remedy; the stockholders who might be compelled to pay the debt having, under another clause of the charter, a remedy over against the corporation for the amount so paid, and against the other stockholders liable for the debt, for what they might pay over and above their just proportion of the same. *New England Commercial Bank v. Stockholders of Newport Steam Factory. Munroe v. Same*, 154.
2. *Held*, further, that this liability for the corporate debts upon the death of a stockholder did not, at law, survive against his estate, and that no action at law could be maintained against the personal representative of such stockholder, to enforce the same; but that the estate of a deceased stockholder might be pursued by the creditor in equity, which, for the sake of the remedy, and to correct the form of the contract so as to carry out its substance, would construe it to be several as well as joint; that in such case a court of equity will decree in favor of the creditor of the corporation, an account of the personal estate of a deceased stockholder, and payment of his debt out of the surplus of the same, after the payment of the separate debts of such stockholder and of the expenses of settling his estate, without regard to the solvency or insolvency of the stockholders liable, and without reference to the state of accounts between the stockholders and the corporation; leaving

the estate to seek repayment from the corporation, and contribution from those liable to it. *Ib.*

3. *Held*, also, that to a bill seeking such relief from the estate of a deceased stockholder, all the living stockholders and representatives of deceased stockholders, liable to the debt, must, as interested in the account to be taken, be made parties defendant to the bill; that if the real assets of the deceased stockholder are sought to be charged, his heirs at law, in case of intestacy, and his devisees, if there be a will, must also be made parties defendant to the bill; that, as two or more creditors for whose claims different sets of stockholders are liable cannot unite them all in the same bill, for the purpose of separate relief against those respectively liable to them, so the same creditor cannot enforce in the same bill, against the estates of deceased stockholders, different debts, for which all the estates pursued are not liable; but that there is no objection, on the ground of multifariousness, to a creditor's seeking, in the same bill, relief out of the estates of two or more deceased stockholders, all of which are liable to his debt. *Ib.*
4. If, after the retiring of a stockholder from the corporation, by the sale of his stock, and due public notice thereof, as required by the charter, the creditor gives up old notes, upon which the stockholder was liable, and takes new ones, especially if done for the purpose of absolving him from liability, and imposing it upon his successor in the stock, this operates as a complete release to him of the debt, both at law and in equity. *Ib.*
5. By force of sect. 8, ch. 161, and sect. 9, ch. 177, of the Rev. Stats. a suit in equity cannot be maintained against the executor of a deceased stockholder, for the payment of a corporate debt out of the personal assets of the testator, after the lapse of three years from the required publication by the executor of notice of his appointment and qualification to act for the estate in that capacity; the policy of these enactments being, thus to enable the speedy settlement of the estates of the dead. *Ib.*
6. If the term "Dexter Ledge of Lime-Rock," used in a charter of incorporation as descriptive of the corporate property, has acquired a settled definite meaning in the community, as including certain lime-rock of definite extent, and excluding all other, such lime-rock only would be deemed to be intended by the charter, whatever might have been the general expectation of the incorporators; and parol evidence is admissible to prove that the term had acquired such meaning. *Dexter Lime-Rock Company v. Dexter & others*, 353.
7. If, however, the petitioners for the act of incorporation use the term, and expressly, or by plain implication, define its extent in their petition, such definition may be resorted to, to explain the meaning of the term in the charter. *Ib.*
8. A pewholder in a church, whose deed from the society before it was incorporated expressly subjected his pew to all rates and taxes imposed thereon by the trustees for expenses and repairs, cannot object to the repeal, without his assent, of a clause in the charter, subsequently obtained, which required the assent of a majority of the pewholders to the imposition by the trustees of any pew tax, where the general assembly have expressly reserved to themselves the power in the charter to alter, amend, or repeal it at pleasure; nor

is notice to the pewholder of the pendency of the petition to the assembly for such repeal, in conformity with ch. 2, sect. 1, of the Revised Statutes, indispensable to the act of repeal. *Bailey, Trustee, v. Trustees of Power Street Methodist Episcopal Church*, 491.

See TURNPIKE COMPANY, 1.

COSTS.

A plaintiff, who brings his action originally in the supreme court for the sum of one hundred dollars or upwards, will be entitled to costs, although the defendant, by a tender in court, has reduced the sum for which judgment is rendered, below that amount. *Haley v. The Newport Gaslight Company*, 582.

See INSOLVENT ESTATES OF DECEASED PERSONS.

COVENANT, ACTION OF.

See AWARD.

COVENANTS.

See LEASE, 1, 2, 3, 4.

DEBT ON JUDGMENT.

See LIMITATIONS, STATUTE OF, 6.

DEED.

1. The term "Great Hill or Ledge of Lime-Rock," in a deed, is to be construed, in order to ascertain its extent and limits, in the light of the circumstances attending the transaction, according to the intent of the parties derived from the language employed by them, rather than according to geological notions, however correct, concerning the continuity and extent of the stratum of lime at the place referred to; and where the hill or ledge is described in the deed as "lying southerly from my dwelling-house," and another ledge is described in the same deed, "as lying easterly from said dwelling-house, and northerly from the driftway leading from said Great Ledge to the lime-kilns," the limits thus implied are to be observed, irrespective of the continuity and extent of the stratum of lime. *The Dexter Lime-Rock Company v. Dexter & others*, 353.
2. Where one who held the legal title to a farm, with a resulting trust to his daughter, with whose money it had been purchased, at her request conveyed the same to a third person, on condition that "she should provide a good and sufficient home and living" for the daughter "during her natural life," but if the daughter should see fit to marry, then the farm conveyed should "revert back" to the daughter, her heirs, &c. after marriage, provided she or they should reimburse the grantee for all the expenses of living up to the time of marriage, and for all the improvements, if any, made upon the farm: *Held*, the daughter having married and reimbursed the grantee according to the condition of the deed, that she became thereby immediately clothed with the

legal title to the farm ; the clause of the deed in her favor being construed to operate by way of a conditional limitation. *Batley v. Hopkins*, 443.

See EQUITY, 12.

DEPOSITIONS.

1. Magistrates empowered to take depositions in Rhode Island, may, by force of ch. 187, sects. 15 and 21, of the Revised Statutes, compel, by attachment for contempt, witnesses, duly summoned by them, to appear before them and depose as to what they know relative to any civil suit or action pending in this or any other state or government. *In the Matter of William A. Jenckes & another*, 18.
2. The application of a poor debtor before a master in chancery in Massachusetts, to be admitted to the poor debtors' oath, under ch. 141 of the Supplement to the Revised Statutes of Massachusetts, is a civil suit, in the sense of the deposition act of Rhode Island, notwithstanding his creditors have filed charges of fraud against him before the master in chancery ; and a Rhode Island magistrate may compel witnesses to give their depositions here, to be used against the debtor in Massachusetts, upon such an application. *Id.*

DISTRICT SCHOOL-HOUSE.

See SCHOOL-HOUSE, 1.

DOWER.

An adulterous elopement from the husband, without reconciliation, is no bar to dower in Rhode Island : the 34th section of the statute of Westminster 2d, 13 Edw. I., never having been introduced here. *Bryan & Wife v. Batchelder*, 543.

EJECTMENT.

See TRESPASS AND EJECTMENT.

EQUITY.

1. A court of equity will not retain a bill to abate a dam which flows lands of the plaintiffs, until the title of the plaintiffs is established at law, after upwards of forty years' user by the defendants of the dam upon payment of compensation, as they aver, under claim of right ; but will dismiss the bill with costs. *Sprague & another v. Rhodes & others*, 56.
2. Where, upon the death of a stockholder of a manufacturing corporation, his liability for the corporate debts does not, at law, survive against his estate, the estate of the deceased stockholder may be pursued by the creditor, in equity, which, for the sake of the remedy, and to correct the form of the contract so as to carry out its substance, will construe it to be several as well as joint ; and in such case a court of equity will decree in favor of the creditor of the corporation, an account of the personal estate of a deceased stockholder, and payment of his debt out of the surplus of the same, after the payment of the separate debts of such stockholder and of the expenses of settling

his estate, without regard to the solvency or insolvency of the stockholders liable, and without reference to the state of accounts between the stockholders and the corporation; leaving the estate to seek repayment from the corporation, or contribution from those liable to it. *N. Eng. Commercial Bank v. The Stockholders of the Newport Steam Factory*; *Munroe v. Same*, 154.

3. To a bill seeking such relief from the estate of a deceased stockholder, all the living stockholders and representatives of deceased stockholders, liable to the debt, must, as interested in the account to be taken, be made parties defendant to the bill; if the real assets of the deceased stockholder are sought to be charged, his heirs at law, in case of intestacy, and his devisees, if there be a will, must also be made parties defendant to the bill; and as two or more creditors for whose claims different sets of stockholders are liable cannot unite them all in the same bill, for the purpose of separate relief against those respectively liable to them, so the same creditor cannot enforce in the same bill, against the estates of deceased stockholders, different debts, for which all the estates pursued are not liable; but there is no objection, on the ground of multifariousness, to a creditor's seeking, in the same bill, relief out of the estates of two or more deceased stockholders, all of which are liable to his debt. *Ib.*
4. If, after the retiring of a stockholder from the corporation, by the sale of his stock, and due public notice thereof, as required by the charter, the creditor gives up old notes, upon which the stockholder was liable, and takes new ones, especially if done for the purpose of absolving him from liability, and imposing it upon his successor in the stock, this operates as a complete release to him of the debt, both at law and in equity. *Ib.*
5. By force of sect. 8, ch. 161, and sect. 9, ch. 177, of the Rev. Stats. a suit in equity cannot be maintained against the executor of a deceased stockholder, for the payment of a corporate debt out of the personal assets of the testator, after the lapse of three years from the required publication by the executor of notice of his appointment and qualification to act for the estate in that capacity; the policy of these enactments being, to enable the speedy settlement of the estates of the dead. *Ib.*
6. Where a court of law is unable to relieve a garnishee who by pure accident or mistake has been prevented thereby from accounting under oath in his own discharge, a court of equity will, under its well-settled jurisdiction, grant him relief; but not where neglect of the garnishee or of his agent is distinctly traceable in the cause of the omission to account. *Rhode Island Exchange Bank v. Hawkins*, 198.
7. Where a bank, served as garnishee, advised with an attorney retained generally in their business, as to what they must do, and were told to make an affidavit, but did not request the attorney to attend to the matter for them, or by informing him what they had to disclose, or by leaving the copy of the writ with him, signify to him that they expected his services; *Held*, that they had no right to expect that he would act for them in the matter, especially, as before the time of accounting had passed, the cashier, who by law was to make the affidavit, knew that the attorney was acting for the plaintiff in the cause; and that an omission to account under such circumstances was

- too plainly traceable to neglect, to warrant equitable relief to the bank, when sued as a garnishee neglecting to account. *Ib.*
8. A bill in equity is not demurrable, because, in stating a trust charged upon lands by an agreement which comes within the scope of the statute of frauds, it does not disclose whether the trust or agreement is provable by proper written evidence or not; the proper course being to take such objection by plea or answer. *Cranston v. Smith*, 231.
 9. A widow, made by her husband's will life tenant of his real estate, was also authorized by the will, in case she should require anything more than the profits of the estate for her comfortable support and maintenance, to sell so much of it, as should, in her judgment, be necessary for that purpose; and the remainder of said estate, if any, was to go to the son and certain grandchildren of the testator, in such manner and proportion as she, by her last will and testament, might direct. She married again; and just before the marriage conveyed the homestead estate of her old husband to her new one, for the nominal consideration of twelve hundred dollars; "said sum," as she expressed it in her deed, "being necessary, in my judgment, for my comfortable support." The real consideration of the deed, however, was the contemplated marriage, and about one hundred dollars paid to her by her betrothed, the defendant, at the time the deed was executed, to enable her to settle a debt she was owing. *Held*, that this was a fraudulent execution by the widow of the power of sale intrusted to her; and that upon her death, intestate, those entitled to the estate in remainder under the will of her first husband might, in equity, compel her second husband, as their trustee, to convey the estate to them, according to their interest, upon condition of repaying to him the hundred dollars with interest, after deducting therefrom the rents and profits of the estate, received by him since the death of the life tenant, with all just allowances. *Hutchinson v. Cole & others*, 314.
 10. An assignment by an insolvent debtor in trust for the benefit of his creditors, with preferences to certain creditors on condition that they will release the assignor within a reasonable time limited in the assignment, is a valid trust in Rhode Island; and the rights of the creditors, as *cestuis que trust* under it, will be protected in equity against sale, under an execution against the assignor levied upon the assigned property subsequently to the assignment. *Nightingale v. Harris & Lippitt & another*, 321.
 11. Upon a mere bill to redeem a tax title upon the ground that the tender required by the statute had been made within the legal time of redemption, the complainant can have no relief upon the grounds, that no tax was assessed, or that the tax was illegally assessed, or that the person who acted as collector of taxes was not collector, or that the sale was void, or the deed void, although the bill speaks of the sale as made by a person who *assumed* to be collector, and of the assessment and sale and deed as *pretended*; the bill not seeking relief upon these latter grounds, and containing no specific allegations fitted to them. *McCulloch v. Dodge & another*, 346.
 12. A court of equity, will, upon full and satisfactory proof, reform a grant of a sea-weed privilege in a deed of a farm, granting, through the ignorance of the scrivener of the principles of conveyancing, a greater privilege than the

- parties to the original contract designed, against a purchaser of the privilege and farm from one of them, who bought under a like contract; but where the purchase was induced by the fraudulent misrepresentations of the complainant as to the productiveness and value of the sea-weed privilege really bargained for, and especially if it appear that the mistake in the grant merely makes the privilege granted equal in productiveness and value to the privilege contracted for as it was represented, the court will not interfere with such a providential adjustment of equities, but will dismiss the complainant's bill, with costs. *Allen v. Brown & another*, 386.
13. A state court has no power to enjoin proceedings in a court of the United States; especially in suit at law for damages for the infringement of a patent, so expressly, if not exclusively, confided by law, to the federal courts. *Kendall & others v. Winsor*, 453.
14. If it had such power, it would be no ground for equitable interference, when the defences relied upon in equity are equally available at law, that parties, who were not at the time of trial examinable as witnesses, have since been made so, in the state courts, by statute. *Ib.*
15. A circuit court of the United States has, irrespective of the citizenship of the parties, power to entertain a bill for discovery in aid of the defences to a suit for the infringement of a patent, as ancillary to such suit, if not by the express authority of the 17th section of the act of congress, passed July 4, 1836, entitled "An act to promote the useful arts," &c. *Ib.*
16. A master appointed under ch. 164, sect. 17, of the Rev. Stats. to settle the accounts of a removed assignee, has jurisdiction over every question which goes to the charge and discharge of the assignee as an accounting party, though involving fraud in the performance of his trust; the act relating to jury trials in equity causes having no application to summary proceedings in equity, upon petition. *Lowitz & Becker & others v. Alden's Assignee*, 512.

ESTATE TAIL.

1. A devise of lands to "my grandson, Stephen Cooper (son of Stephen), my aforementioned grandson to come into possession at twenty-one years of age, and to have and to hold the abovenamed bequest to him during his natural life; and after his decease, I give the proceeds unto his male heirs, equally between them, and, for want of heirs male, then to go in equal shares to his daughters," vests an estate tail in Stephen, the grandson, under the rule in Shelley's case; the clause of the statute of wills in relation to the creation and continuance of estates tail, not being applicable to such a case. *Cooper & others v. Cooper*, 281.
2. To bar an estate tail, the deed of the tenant in tail, if executed and acknowledged as required by section 3, ch. 145, of the Revised Statutes, need not, as against the heirs of the tenant, be recorded in the records of the town where the land lies. *Ib.*
3. A testatrix made to her grandchildren several specific devises, "to their heirs and assigns forever;" and in the eighth clause of her will proceeded:—
- "Eighthly. I give and devise all the remainder of my real estate unto all my

grandchildren, in equal shares, and to their heirs and assigns forever. And it is hereby provided, and my will is, that if any of my grandchildren should die, leaving no surviving issue; then I give and devise all the estate, real and personal herein given to such grandchild, unto the survivor or survivors of such as shall die as aforesaid, and to their heirs and assigns forever; provided, that none of my grandsons shall, in any event, have any of my personal estate, other than the specific legacies herein bequeathed unto them, as long as any of my granddaughters, or any of their issue be living. It is also further provided, and my will is, that if all my grandchildren should die leaving no surviving issue, then I give and devise all my estate unto two of the daughters of my uncle, Thomas Field, to wit: Mary and Sally, and unto two of my said uncle's granddaughters, to wit: Mary and Elizabeth Thornton, and to their heirs and assigns forever." *Held*, that the grandchildren of the testatrix took estates-tail in her real estate, and not fee-simples conditional upon their dying without issue. *Burrough & wife v. Foster*, 534.

See WILLS, 4.

EVIDENCE.

1. The minutes of the testimony of a witness, taken by a judge in the course of a trial before him, are competent as evidence in another case to which the witness is a party, of an admission made by the witness in his testimony, when such minutes are accompanied by the testimony of the judge that they were so taken, and that he believes them to be correct; although he also swears that he has no recollection of the testimony of the witness, and that the minutes do not recall the testimony to his memory. *Fitzpatrick & others v. Fitzpatrick & others*, 64.
2. Upon an indictment for keeping the nuisance of a cockpit, an entry on the cash-book of a gas company, crediting a sum of money as paid by the defendant for gas furnished to him at the cockpit, was held admissible to pass to the jury, to prove that the defendant kept the pit at the time referred to in the entry, although verified only by proof that the entry was in the handwriting of the former cash-keeper of the company, and was made in the regular course of business; it being also proved that the cash-keeper was absent from the state, and in parts unknown. *State v. Mace*, 85.
3. Where a witness has sworn in his direct examination that the criminal acts were done within the times laid in the indictment, and upon cross-examination it appears that he cannot fix the precise date of any one of them, it is permissible in reply to re-examine the witness as to the means by which he is enabled to ascertain that the criminal acts were done within the period covered by the indictment. *State v. Williams*, 207.
4. Unless it appear that a party excepting to the suggestive or leading character of questions put by his opponent to his witnesses has suffered injury therefrom, a court of error, upon a bill of exceptions which does not disclose the circumstances, will hardly interfere with a matter so amenable to circumstances, and so much within the discretion of the judge trying the cause. *Id.*
5. The representation of one tenant in common as to the extent of the subject

- of a joint conveyance by him and his cotenants, cannot estop his cotenants from claiming according to their rights; nor can the representation estop him, unless acted upon by the purchaser. *The Dexter Lime-Rock Company v. Dexter & others*, 353.
6. The statute claim of a child, born after the execution of his father's or mother's will, for whom no provision is made therein, to the same right and interest in the estate of his father or mother, as if the father or mother had died intestate, cannot be resisted by proof that the omission to provide for him was intentional; and hence, on the trial of an action of ejectment, in which the plaintiffs claimed against the will of the parent in right of the after-born child, parol evidence to this effect was held inadmissible. *Chace & others v. Chace & others*, 407.
 7. That a child was called and treated by a man and his family as his daughter, is presumptive proof of her legitimacy, and is admissible as evidence of the same, although the town registry of the father's marriage, compared with that of the daughter's birth, speaks a different language. *Viall & others v. Smith*, 417.
 8. Where a town clerk, acting under the statute "for registering marriages, births, and burials," contained in the Digest for 1798, p. 486, recorded the fact of a marriage at a certain time, instead of recording the certificate to the fact of the official who joined the persons in marriage; *Held*, that a certified copy from such a registry was no proof of the time of marriage, unless traced by evidence to information furnished by the persons married, or by members of their family. *Ib.*
 9. A declaration by a father concerning his daughter, "that unless he made a will, Louisa could get nothing by law," is admissible as evidence tending to prove her illegitimacy; it being for the jury to pass upon the sense in which the father used the expression. *Ib.*
 10. The wife of one who prosecutes criminally for an assault and battery committed upon her person is a competent witness to sustain the complaint, notwithstanding her husband has entered into a recognizance, as required by statute, to pay costs in the event that the prosecution fails. *State v. Borden*, 495.
 11. What a town or city has paid neighboring proprietors as damages for their land taken and injured by the laying through it of a street, and in compromise of their claims for such damages pending an appeal, cannot be given in evidence to prove the damages of another like claimant and appellant. *Howard v. The City of Providence*, 514.
 12. The competency of a person to give his opinion under oath as an expert, so that upon the preliminary examination he appears to have any pretensions to speak as such, rests very much in the discretion of the judge trying the cause. *Ib.*
 13. There is no legal intendment, under chapter 78 of the Revised Statutes, that domestic liquors, sold in large quantity, are illegally sold, so as to relieve a defendant, who attempts to impeach his own promissory note upon the ground that it was given to secure the price of liquors illegally sold, from the burden of satisfying the jury, by direct or circumstantial proof, that the

plaintiffs were not manufacturers or distillers of liquors in this or some other state, or that the liquors were not made for the purpose of exportation. *Craig & Co. v. Proctor*, 547.

EXECUTOR.

See LIMITATIONS, STATUTE OF, 2, 3.

EXECUTION, LEVY AND SALE UNDER.

1. Prior to the enactment of the 12th section of ch. 195 of the Revised Statutes, an officer charged with an execution which he had levied upon real estate had an incidental power, for good cause, to adjourn from time to time the sale of the estate levied on, fixing the day of the adjourned sale at such time as he, under the circumstances, being responsible for a proper exercise of his discretion, thought fit, and giving reasonable notice of the adjourned day of sale in the manner provided by law for giving notice of the original sale; the section recognizing, but not conferring the power of adjournment, and its whole force being expended in its requiring, at least, one week's notice of the adjourned sale in manner aforesaid. *Reynolds v. Hoxsie*, 463.
2. An execution sale of real estate which took place in 1855, before the enactment of said section, after being twice adjourned to enable mistakes in the newspaper advertisement to be corrected was held valid. *Ib.*

EXPERTS.

See EVIDENCE, 12.

FENCE-VIEWER.

1. Upon an application to a fence-viewer of a town, under the 8th section of chap. 91, of the Revised Statutes, to settle a controversy about the rights of occupants of land in partition fences, and their obligation to maintain the same, all that the fence-viewer can do is, after due notice, to determine the rights of the respective parties, by assigning to each his share of the fence, and to direct the time within which each shall erect or repair the same; and he cannot, upon such application and notice, proceed to mulct either party for neglecting or refusing to obey his order. *Franklin & others v. Wells*, 422.
2. To warrant the proceedings under the 5th section of the same statute, it is necessary that there should be a complaint to the fence-viewer of the neglect or refusal by an occupant to rebuild or repair his share of a partition fence, and a determination by the fence-viewer, after due notice to the party complained against, that the complaint is true, and an assignment of a time within which the neglecting party may perform his duty; and although no notice is, in terms, required by the statute to be given to the delinquent occupant, when, under the provisions of the 6th section, the fence-viewer proceeds to ascertain the cost to the complainant of rebuilding or repairing the fence, yet such notice is required by the principles of natural justice, and the judgment and certificate of the fence-viewer will be void without it. *Ib.*

FIRE POLICY.

See INSURANCE, 3, 4, 5, 6.

GARNISHEE PROCESS.

An assignment in trust for the benefit of creditors, made in New York between citizens thereof, is held in that state to transfer to the assignee a debt due to the assignor in another state, without notice of the assignment to the debtor, provided the debtor be not prejudiced by want of notice; and hence, such an assignment, when prior in time to an attachment by foreign process of the assigned debt here, will defeat the attachment. *Noble v. Smith*, 447.

See EQUITY, 6, 7.

GENERAL ASSEMBLY.

A pewholder in a church whose deed from the society before it was incorporated expressly subjected his pew to all rates and taxes imposed thereon by the trustees for expenses and repairs, cannot object to the repeal, without his assent, of a clause in the charter subsequently obtained, which required the assent of a majority of the pewholders to the imposition by the trustees of any pew tax, where the general assembly have expressly reserved to themselves the power in the charter to alter, amend, or repeal it at pleasure; nor is notice to the pewholder of the pendency of the petition to the assembly for such repeal, in conformity with ch. 2, sect. 1 of the Revised Statutes, indispensable to the act of repeal. *Bailey, Trustee, v. Trustees of Power Street Methodist Episcopal Church*, 491.

See CONSTITUTIONAL LAW, 1.

HIGHWAYS.

1. In opening a new highway or amending an old one, the town-sergeant or surveyor may, under the law, remove growing trees or brushwood from the space appropriated to the highway, but has no right, as included within the original assessment of damages, or the easement of the public, to use such trees or brushwood in the building or amendment of the roadway; and if he does so use them, he becomes a trespasser. *Tucker & another v. Eldred & others*, 404.
2. Where the owners and their lessees of land, through which a highway is laid out, unite in an appeal from the decree of the town council laying out the highway, upon the grounds, that the highway was unnecessary, and that no damages were awarded to them, and at the trial of the appeal claim joint damages, it is no matter in arrest of judgment, that separate damages have not been assessed to them. *Thornton & others v. Town Council of North Providence*, 433.
3. The liability of a town to repair a highway within its limits may be proved, upon an indictment against it for neglecting to repair, by the assumption by the town of the duty to repair and actually repairing the same from time immemorial; the 24th and 25th sections of chapter 43 of the Revised Stat-

utes not being construed to change the common law in this respect, nor the 16th section of the same chapter, and those immediately following it, to abrogate the liability of a town to repair, fixed before the passage of that portion of the statute. *State v. Town of Cumberland*, 496.

4. Considerations proper to be taken into account by a jury in estimating the damages of one, part of whose land has been taken for a street under the act of January session, 1854, entitled, "An act in relation to the laying out, enlarging, straightening, or otherwise altering streets in the city of Providence." *Howard v. The City of Providence*, 514.

HUSBAND AND WIFE.

The wife of one who prosecutes criminally for an assault and battery committed upon her person is a competent witness to sustain the complaint, notwithstanding her husband has entered into a recognizance, as required by statute, to pay costs in the event that the prosecution fails. *State v. Borden*, 495.

See DOWER, 1; MARRIED WOMAN'S ACT.

INDEFINITE FAILURE OF ISSUE.

See WILLS, 9.

INDICTMENT.

1. Where a statute punishes the keeping and maintaining of a grog-shop and tippling-shop, or building, place, or tenement used for the sale or keeping of intoxicating liquors, or where intemperate, idle, noisy or disorderly persons are in the habit of resorting, as a common nuisance, an indictment upon the statute may charge the offence in the language of the statute, to have been committed in both these modes, and proof that it was committed in either mode will maintain the indictment. *State v. Plastridge*, 76.
2. An indictment charging in one and the same count the distinct offences of entering a dwelling-house with an intent to steal, and an actual theft therein, is not on that account objectionable. *State v. Colter*, 195.

INJUNCTION.

See EQUITY, 13, 14.

INSOLVENT LAW.

Upon the filing of a petition by creditors of an insolvent for the appointment of a new assignee of his assets, in the place of the original assignee deceased, notice of the pendency of the petition must be given by the clerk to the creditors of the insolvent, by advertisement for three weeks, before the court will act, in analogy to the notice required by statute upon an original petition for the benefit of the insolvent act. *Arnold & others, in the matter of Darius Sessions*, 17.

INSOLVENT ESTATE OF DECEASED PERSON.

Where a claim allowed by the commissioners upon the estate of a deceased insolvent is stricken by the administrator from the commissioner's report, and the claimant recovers in an action at common law judgment for his claim or any portion of it, the practice is to order the plaintiff's costs, as well as debt, to be added to the commissioner's report; the case falling within the spirit, if not the letter, of sect. 14, ch. 158, of the Rev. Stats. as to the disposition of the plaintiff's costs. *Mathewson v. Sheldon, Administrator*, 228.

INSURANCE.

1. Where, under a policy on all iron purchased by, or consigned to, the insured, insurance was effected by him on "808 bundles rods" at and from Liverpool to Providence, via New York and Boston, and the policy provided, "that said company shall not be liable for any partial loss on bar or sheet iron, iron wire, hoop iron, tin plates, ice, salt, grain of all kinds, &c.; nor for any partial loss on hemp or flax, unless the same shall amount to 20 per cent. on the whole aggregate value thereof," &c.; *held*, in case of a partial loss claimed on the bundles of rods insured, that the court cannot determine as a matter of law, whether "bundles of rods" are "bar iron," within the meaning of the proviso, but that the same is a question of fact to be submitted to the jury; that, to the meaning of these terms in the trade, the testimony of any persons connected with it, whether as manufacturers, retail dealers, or workers in iron, as well as of insurers of iron or merchants effecting insurance upon it, was admissible in evidence; but that such testimony might be controlled by evidence of a usage to treat "bundles of rods" as "bar iron" under the above proviso, in the adjustment of losses upon such policies; to which usage only the testimony of insurers, insurance brokers, and merchants accustomed to make and settle losses upon contracts of insurance upon such subjects, should be admitted. *Evans v. The Commercial Ins. Co.* 47.
2. *Held*, also, that the rule to ascertain the amount of a partial loss was, by deducting the gross produce of sales of the damaged goods, at the port of arrival, from the gross produce of the sales of such goods if they had arrived sound, to ascertain the proportion or percentage of loss, and to take that percentage upon the cost of the goods insured, or their value in the policy, as the amount which the insurer is to pay; but that under the above proviso the insurer was exempted from any partial loss on "bar iron," though the same exceeded 20 per cent.; but that, where the jury, being misinstructed in this last particular, found for the plaintiff, under the general issue, a partial loss, exceeding 20 per cent., but also found specially, upon the evidence, that "bundles of rods" were not "bar iron," the misinstruction was no ground for new trial. *Id.*
3. Where the directors of a mutual fire insurance company are empowered by charter "to determine the sum to be insured upon any building, provided it do not exceed three fourths of the value thereof," but are, by the general powers vested in them, to determine the value of the building, the company,

when sued for a loss under a policy, is estopped from objecting that the sum insured by the directors exceeded the prescribed limit of value; there having been no fraud or misrepresentation as to value on the part of the insured. *Hozsie v. The Providence Mutual Ins. Co.* 517.

4. A plea alleging such excess of insurance over value in full answer to a count upon the policy, is bad upon demurrer, inasmuch as it goes only to such excess, — and thus sets up but a partial defence to the count. *Ib.*
5. A fire policy taken out from a mutual company by a mortgagor of a house upon his interest in it, though assigned with the assent of the company to the mortgagee, is avoided by a quitclaim deed by the mortgagor of all his interest in the land to the mortgagee, executed after the assignment and before the loss, the policy never having been ratified and confirmed by the company, and the charter providing, that upon alienation of a house insured "by sale or otherwise," the policy shall be *ipso facto* void, unless ratified and confirmed to the alienee. *Ib.*
6. Such policy too, upon a house described therein as "occupied for a dwelling-house," "the basement being of stone and wood," becomes void in the hands of the mortgagee by the use and occupation of the basement of the house, after the assignment and before the loss, as a joiner's shop, although such change of use was unknown to the mortgagee; the charter expressly providing, that "no policy shall extend or be construed to extend" to such and other specified risks, "unless the same are expressly mentioned in the policy, and a proportional premium and deposit paid." *Ib.*

JUDGE'S MINUTES OF EVIDENCE.

See EVIDENCE.

JURISDICTION.

1. A state court has no power to enjoin proceedings in a court of the United States; especially in a suit at law for damages for the infringement of a patent, so expressly, if not exclusively, confided by law to the federal courts. *Kendall & others v. Winsor*, 453.
2. If it had such power, it would be no ground for equitable interference, when the defences relied upon in equity are equally available at law, that parties, who were not at the time of trial examinable as witnesses, have since been made so, in the state courts, by statute. *Ib.*
3. A circuit court of the United States has, irrespective of the citizenship of the parties, power to entertain a bill for discovery in aid of the defences to a suit for the infringement of a patent, as ancillary to such suit, if not by the express authority of the 17th section of the act of congress, passed July 4, 1836, entitled, "An act to promote the useful arts, &c." *Ib.*

See LIQUOR LAW.

JURY.

Where the jury, after having retired to consider their verdict upon an indictment charging a statute offence, sent for, and procured, through the officer

in attendance upon them, a copy of the Revised Statutes for use in their deliberations, without the knowledge and consent of the court or counsel, their verdict, convicting the defendant, was, upon his motion, set aside, and a new trial granted to him. *State v. Smith*, 33.

LACHES.

A court of equity will not retain a bill to abate a dam which flows lands of the plaintiffs, until the title of the plaintiffs is established at law, after upwards of forty years' user by the defendants of the dam upon payment of compensation, as they aver, under claim of right; but will dismiss the bill with costs. *Sprague & another v. Rhodes & others*, 56.

LANDLORD AND TENANT.

Tenants of the mortgagor under a lease executed subsequently to the mortgage, by promising to pay, and paying rent, to the mortgagee under a forfeited mortgage, disentitle the mortgagor from recovering the same from them; they becoming thereby, through attornment, the tenants of the mortgagee. *Kimball v. Lockwood & Smith*, 138.

See LEASE.

LEASE.

1. In construing a covenant in a lease by indenture, the words of the covenant are to be taken, however set down in the instrument, as the words of the party to whom they properly belong, or if properly belonging to both, as the words of both; the words of an indenture being the words of either party, and not to be taken most strongly against the one or beneficially for the other, as the words of a deed-poll are. *Beckwith v. Howard*, 1.
2. Under this rule, where in the clause of demise in the lease, following a description of the lot leased as bounded on either side by a gangway, is thrown in this sentence, "the said gangways are to be kept open for the benefit of the lot hereby leased, and also of the lots hereunto adjoining," held, that this was a covenant of the lessee as well as of the lessor. *Ib.*
3. A court of equity will, at the suit of a joint owner of the reversion of premises leased for a term of ninety-five years, upon final hearing, perpetually enjoin the lessee, who has purchased in four fifths of the reversion, from building upon, or over, or closing up, or incumbering, contrary to a stipulation in the lease, a private gangway laid out between, and for the benefit of the demised premises and an estate adjoining owned by the lessee; and this, without regard to the use or value for use of the gangway, or to the comparative advantage to the plaintiff and disadvantage to the defendant consequent upon the injunction. *Ib.*
4. Where in a lease of a city lot for ninety-five years, — the rent to be appraised at the end of the first fifteen years, and every five years thereafter during the term, — the lessee covenanted, "that he would pay, or cause to be paid, all taxes and assessments that might, at any time during the term, be assessed upon said lot or its appurtenances," it was held, that the covenant did not

extend to a city assessment upon the landlord for benefits derived to his reversion from the laying out of a new street contiguous to the lot, for which improvement the tenant, according to his interest, was also assessed; inasmuch, as the assessment was made under an act not in existence at the time of the execution of the lease, was novel and extraordinary in its character, and could not have been in the contemplation of the parties when the covenant was made. *Love & Wife v. Howard*; *Waterman v. Same*, 116; *Second Universalist Society in Providence v. The City of Providence*, 235.

LEGITIMACY, EVIDENCE OF.

See EVIDENCE, 7, 9.

LIBEL.

See PLEADINGS AND PRACTICE AT LAW, 5.

LIMITATIONS, STATUTE OF.

1. A plea that "said several *supposed* causes of action in said counts mentioned, if any such there be or still are," did not accrue within six years, is defective, for not confessing the causes of action which it seeks to avoid; but, as the defect is formal merely, by force of ch. 184, § 4, of the Rev. Stats. the court must support the plea, though for this cause specially demurred to. *Marchant, Trustee, v. The Valley Falls Baptist Church*, 24.
2. Heirs at law, in whose hands the real assets of their ancestor are pursued for his debts, may set up the bar of the statute of limitations; nor is it any answer to a plea of the statute, in such case, that the creditor was one of the administrators of the estate of the ancestor, which was represented insolvent; since the creditor might have presented his claim to the commissioners for examination and allowance. *Fenner v. Manchester & others*, 140.
3. By force of sect. 8, ch. 161, and sect. 9, ch. 177, of the Rev. Stats., a suit in equity cannot be maintained against the executor of a deceased stockholder of a corporation, the members of which are liable for the corporate debts, for the payment of a debt out of the personal assets of the testator, after the lapse of three years from the required publication by the executor of the notice of his appointment and qualification to act for the estate in that capacity; the policy of these enactments being, to enable the speedy settlement of the estates of the dead. *New England Commercial Bank v. The Stockholders of the Newport Steam Factory*; *Munroe v. Same*, 154.
4. The bar of the statute of limitations cannot, in Rhode Island, be indefinitely postponed by continuances of process issued from term to term, as under the English practice and statutes; but the 8th section of ch. 177, of the Rev. Stats. allows one year, and one year only, after the defeat, from inability to serve the writ, of an action commenced in due time, within which to bring a new action for the same cause. *Taft & Co. v. Daggett*, 266.
5. He who indorses a note payable to another at the time it is made, is to the payee a joint and several promisor with the maker; and as such, although but a surety as between himself and the maker, all promises and part pay-

ments made by the maker equally affect his liability under the statute of limitations, as if made by himself. *Perkins, Administrator, v. Barstow*, 505.

6. An action of debt brought in 1859 upon a judgment obtained in 1837, is barred by the express provision of the first section of the "Act for the limitation of certain personal actions," contained in the Digest of 1844, because not brought "within twenty years next after the cause of action;" that provision being construed to apply to causes of action existing at the passage of the act, whenever such application will not deprive a party of a vested right by allowing him no reasonable time within which to commence his action. *Fiske, Administratrix, v. Briggs*, 557.

LIQUOR LAW.

1. Justices of the peace, and courts of magistrates exercising the jurisdiction of justices of the peace, have jurisdiction over the offence of selling liquor in violation of ch. 78, § 16, of the Revised Statutes; and the supreme court has jurisdiction to entertain appeals, in such cases, from such justices and courts. *State v. Crogan*, 40.
2. Where a statute punishes the keeping and maintaining of a grog-shop and tippling-shop, or building, place, or tenement used for the sale or keeping of intoxicating liquors, or where intemperate, idle, noisy or disorderly persons are in the habit of resorting, as a common nuisance, an indictment upon the statute may charge the offence in the language of the statute, to have been committed in both these modes, and proof that it was committed in either mode will maintain the indictment. *State v. Plastringe*, 76.
3. To convict one of being a common seller of strong or intoxicating liquors, under sections 26 and 27 of ch. 78 of the Rev. Stats. it is not necessary that he should have been twice convicted of selling in violation of section 16 of the same chapter, and a third sale by him proved within six months of his last conviction; but proof of any three distinct sales, either to the same person, or to different persons, is sufficient to maintain the indictment; the last clause of the 27th section not being designed to limit the effect of the first clause of the section, but to ease a doubt which had arisen about a double conviction founded in part upon the same proof. *State v. Williams*, 207.

See PROMISSORY NOTES, &c. 8.

MAINTENANCE, WHAT, IN A WILL, CREATES A RIGHT TO, &c.

See WILLS, 1, 10, 11.

MALICIOUS PROSECUTION.

1. One who had taken the growing fruit of another without leave, was prosecuted therefor on a criminal complaint, which charged, that he "feloniously did steal, take, and carry away cultivated fruit, to wit, ripened cherries, being and growing upon the land and possessions of the complainant, &c.," which complaint was quashed. *Held*, that an action for malicious prosecution could not be maintained by the accused, though the accusation were maliciously made; the complaint being, not for theft, but substantially for trespass, under

ch. 214, § 20, of the Revised Statutes, with words of harsh surplusage, and it having been proved that the plaintiff committed the trespass. *Bartlett v. Brown*, 37.

2. Where, in such case, the prosecutor, a laboring man, truly stated his cause of complaint to a counsellor at law for his advice and direction, and pursuing that advice, signed and swore to a complaint, as aforesaid, prepared for him by the counsellor under a misrecollection of the statute, the misnomer of the offence in the complaint will not support an action for malicious prosecution, even in case of the most express malice in prosecuting; inasmuch as there was probable cause for the prosecution, in the form in which it was made. *Id.*

MARRIED WOMAN'S ACT.

A husband in the actual possession of the wife's real estate, no trustee of the same having been appointed under the "Act concerning the property of married women," is, notwithstanding the provisions of said act, so far seized of her real estate, that where his interest in the same is sold under a decree against him for the enforcement of a mechanic's lien, the purchaser may maintain trespass and ejectment against the husband to recover possession of such estate. *Martin & Goff v. Pepall*, 92.

MECHANICS' LIEN.

A petition for a lien under the mechanics' lien law, filed against two persons, as joint contractors for the work done and materials furnished, is not supported by proof that the contract was made by one of them; and in case there be not sufficient evidence that the contract was joint, to be weighed by the jury, may be taken from them and dismissed by the court, as, under like circumstances, a nonsuit may be ordered in an action at law. *Thurston, Gardiner & Co. v. Schroeder & others*, 272.

MILITIA OFFICER.

A militia officer cannot, when out of the state, claim exemption from civil process, upon the ground that he is on his way, under the orders of his commanding officer, to attend a company meeting, for escort duty, within the state; since, in such case, he is without the jurisdiction of his commanding officer. *Manchester v. Manchester*, 127.

MORTGAGES.

1. An advertisement, giving notice of a mortgagee's sale under a power contained in the mortgage, is sufficient, although not signed by the mortgagee, and although the mortgaged premises to be sold are described in it no more particularly, than as "situated in the northerly part of the city of Providence, being the lot of land No. 10 (ten) on the plat of the land of S. W., surveyed and platted by H. F. W., July 7, 1845," provided the plat be recorded. *Fitzpatrick & others v. Fitzpatrick & others*, 64.
2. Where a deed is so defectively executed under a power contained in a mortgage as to be void, and is followed by a quitclaim deed of the title, executed

by the grantee to the mortgagee who sold under the power, the former deed may, by consent of parties, be corrected by interlineations, and both deeds being reacknowledged and recorded afresh as of a subsequent date, may be presumed to be redelivered as of the new date, so as to take effect from their redelivery. *Ib.*

3. Tenants of the mortgagor under a lease executed subsequently to the mortgage, by promising to pay, and paying rent, to the mortgagee under a forfeited mortgage, disentitle the mortgagor from recovering the same from them; they becoming thereby, through attornment, the tenants of the mortgagee. *Kimball v. Lockwood & Smith*, 138.
4. The notice of sale under a power in a mortgage, usually required to be advertised by the mortgagee or his assignees in a public newspaper for a certain number of days previous to the sale, is designed to secure the attendance of purchasers of, and a fair price for, the mortgaged estate; and where such a notice was not signed by any one, and gave neither the name of the mortgagor, nor of the mortgagee, nor, correctly, a reference to the page of the volume of Land Records in which the mortgage was recorded, nor even the name of the auctioneer who was employed to sell the estate, it was held to be fatally defective, and, notwithstanding a sale under it, a redemption of the mortgaged estate was decreed to the assignee of the equity; such notice affording to persons who might desire to purchase the estate no means of ascertaining the validity of the title offered to them. *Hoffman v. Anthony & others*, 282.
5. In ejectment to recover possession of lands mortgaged to the plaintiff, it appearing by the defendants' plea, that the mortgage was given to secure the payment of a promissory note, the principal sum of which was payable at the end of four years, but the interest *annually*, it was held, that the condition of the mortgage was broken by the non-payment of the annual interest for three years, although the principal sum was not due; and that conditional judgment for possession must be entered up for the plaintiff, in conformity to sect. 7, ch. 189, of the Revised Statutes. *Carpenter v. Carpenter & others*, 542.
6. An auction sale of land under a power contained in a mortgage may be avoided, where, by a mistake in the advertisement, the sale is advertised to be made in one year, and was designed to be made and was actually made in the succeeding year; or where the tract of land as advertised, although, by its description, it includes the lot sold, contains double the area of the latter. *Fenner v. Tucker*, 551.
7. A purchaser at such a sale, who, when bid against, expostulates with a rival bidder, informing him of his losses, and telling him that on account of them he ought not to bid against him, thereby causing the bidder to withdraw and obtaining the land at a considerable undervalue, will not be allowed to retain the benefit of his purchase against a subsequent mortgagee of the land who seeks to redeem the mortgage under which the sale is made. *Ib.*

NEW TRIAL.

1. Where the jury, after having retired to consider their verdict upon an indict-

ment charging a statute offence, sent for, and procured, through the officer in attendance upon them, a copy of the Revised Statutes for use in their deliberations, without the knowledge and consent of the court or counsel, their verdict, convicting the defendant, was, upon his motion, set aside, and a new trial granted to him. *State v. Smith*, 83.

2. Where the title produced by a plaintiff in an action of trespass and ejectment is fatally defective for a cause not noticed or objected by the defendant at the trial, the court may, nevertheless, grant to the defendant a new trial on the ground of such defect, provided it is apparent that the defect, if objected at the trial, could not have been remedied by further proof on the part of the plaintiff. *Fitzpatrick & others v. Fitzpatrick & others*, 64.
3. Where, upon the trial of an indictment for keeping the nuisance of an ale-house, the defendant passed to the jury a book of charges for the purpose of confirming the testimony of a witness who kept the book, and who swore that at the time laid in the indictment he furnished ale by the cask, at the ale-house, not to the defendant, but to another person; *held*, that it was no ground for a new trial, that the jury might have been influenced to convict the defendant by the suspicious appearance of the book, commented on by the attorney-general, without opportunity on the part of the defendant to answer or explain; or, that the jury might have been swayed by other charges in the book against the defendant, relating to a period prior to that laid in the indictment, to which the attention of the jury was not directed, and which it was not proved that they saw. *State v. Sweetland*, 90.
4. Unless it appears that a party excepting to the suggestive or leading character of questions put by his opponent to his witnesses has suffered injury therefrom, a court of error, upon a bill of exceptions which does not disclose the circumstances, will hardly interfere with a matter so amenable to circumstances, and so much within the discretion of the judge trying the cause. *State v. Williams*, 207.
5. The supreme court has, under ch. 193, sect. 2, of the Rev. Stats., power to entertain a petition of a party erroneously nonsuited by the court of common pleas, filed within one year of the nonsuit, although such nonsuit was not caused by any accident, mistake, or other unforeseen cause, but was deliberately ordered by the common pleas; a party improperly nonsuited by the court, when he had a right to the judgment of the jury on his case, not having had "a full, fair, and impartial trial," in the sense of the statute. *Thurston, Gardiner & Co. v. Schroeder & another*, 272.
6. A party aggrieved by the ruling of the court of common pleas in matter of law, and whose bill of exceptions has been duly allowed by the judge who tried the cause, but has been dismissed by the supreme court because he had neglected to give bond to prosecute his exceptions as required by ch. 192, sect. 17, of the Rev. Stats., may, nevertheless, proceed, for the same cause, by petition for new trial in said court, under ch. 193, sect. 2, of the Rev. Stats. *Ib.*

See REFERENCE AND REFEREES, 2, 3, 4.

NORTH PROVIDENCE, ORDINANCE OF.

1. The ordinance passed by the town council of North Providence, on the fourth day of March, 1850, entitled "An ordinance for the government and regulation of the police of the town of North Providence," although not contained in the revised ordinances of said town adopted by the town council of North Providence in 1858, is not repealed thereby, because "not repugnant to the provisions of the ordinances" contained therein, and so not within the repealing clause of said revision. *State v. Pollard*, 290.
2. Nor is the above ordinance repealed by the fourth section of the act of the general assembly, passed at the January session, 1852, entitled "An act authorizing the town of North Providence to establish bridewells, and for other purposes." *Ib.*

PATENTS.

See EQUITY, 13, 14, 15.

PERSONAL LIABILITY OF STOCKHOLDERS.

See CORPORATION, 1, 2, 3, 4, 5.

PEWS AND PEW-HOLDERS.

See CORPORATION, 7.

PLEADINGS AND PRACTICE AT LAW.

1. A plea that "said several *supposed* causes of action in said counts mentioned, if any such there be or still are," did not accrue within six years, is defective, for not confessing the causes of action which it seeks to avoid; but, as the defect is formal merely, by force of ch. 184, § 4, of the Rev. Stats. the court must support the plea, though, for this cause, specially demurred to. *Marchant, Trustee, v. The Valley Falls Baptist Church*, 24.
2. Where both counts of a declaration relate to the same cause of action, and one is good and the other bad, a verdict for entire damages on the whole declaration will be supported, upon motion in arrest, by being applied to the good count. *Aldrich v. Lyman*, 98.
3. Under the statutes of Rhode Island, which authorize and require the executor or administrator of a deceased party to a pending action at law, wherein the cause of action survives, to appear and further prosecute or defend the action, and also define the entry of a suit in court to be, the filing of the necessary papers in the case with the clerk and the payment to him of the entry fee on the first or second day of the term, a plea in abatement of an action, the declaration in which, following the writ, is in the name of a deceased plaintiff, "that, after the service of the writ, and before the filing and entering of the action in court, the plaintiff died, and an administrator was appointed and qualified to act for her estate," is bad upon demurrer; inasmuch, as it is consistent with the supposition, that the plaintiff may have died after the filing of the declaration, which then would properly be in her name, and before the entry of the action in court. *Webster v. Baggs*, 247.

4. The bar of the statute of limitations cannot, in Rhode Island, be indefinitely postponed by continuances of process issued from term to term, as under the English practice and statutes; but the 8th section of ch. 177, of the Rev. Stats. allows *one year*, and one year only, after the defeat, from inability to serve the writ, of an action commenced in due time, within which to bring a new action for the same cause. *Taft & Co. v. Daggett*, 266.
5. If a plea, justifying a libel which contains distinct things, may justify a part only, it will, at all events, be bad on general demurrer, if where the libellous matter be all charged in one count, it do not deny or justify the whole libellous matter so charged, or do not justify all the charges in the libellous matter which it professes to cover. *Ames v. Hazard*, 335.
6. The judge trying a cause, with a jury, has a discretion with regard to the order of proof; and it is no improper exercise of this discretion for him to allow a party, who has closed his evidence upon the mistaken supposition that a material fact is admitted, to submit evidence of the fact to the jury, after the objection is made by the other party that the material fact has not been proved. *Town of Hopkinton v. Waite, Town Treasurer*, 374.
7. Where the owners and their lessees of lands, through which a highway is laid out, unite in an appeal from the decree of the town council laying out the highway, upon the grounds that the highway was unnecessary, and that no damages were awarded to them, and at the trial of the appeal claim joint damages, it is no matter in arrest of judgment that separate damages have not been assessed to them. *Thornton & others v. Town Council of North Providence*, 433.
8. Where a claim allowed by the commissioners upon the estate of a deceased insolvent is stricken by the administrator from the commissioner's report, and the claimant recovers in an action at common law judgment for his claim or any portion of it, the practice is to order the plaintiff's costs, as well as debt, to be added to the commissioner's report; the case falling within the spirit, if not the letter, of sect. 14, ch. 158, of the Rev. Stats. as to the disposition of the plaintiff's costs. *Matheuson v. Tillinghast, Administrator*, 223.

See BOND FOR THE LIBERTY OF THE JAIL YARD, 4; NEW TRIAL, 6;
MECHANIC'S LIEN, 1; INSURANCE, 6.

POSTHUMOUS CHILDREN.

See EVIDENCE, 6.

POWERS.

1. An advertisement, giving notice of a mortgagee's sale under a power contained in the mortgage, is sufficient, although not signed by the mortgagee, and although the mortgaged premises to be sold are described in it no more particularly, than as "situated in the northerly part of the city of Providence, being the lot of land No. 10 (ten) on the plat of the land of S. W., surveyed and platted by H. F. W., July 7, 1845," provided the plat be recorded. *Fitzpatrick & others v. Fitzpatrick & others*, 64.
2. Where a deed is so defectively executed under a power contained in a mortgage as to be void, and is followed by a quitclaim deed of the title, exe-

cuted by the grantee to the mortgagee who sold under the power, the former deed may, by consent of parties, be corrected by interlineations, and both deeds being reacknowledged and recorded afresh as of a subsequent date, may be presumed to be redelivered as of the new date, so as to take effect from their redelivery. *Id.*

3. The notice of sale under a power in a mortgage, usually required to be advertised by the mortgagee or his assignees, in a public newspaper, for a certain number of days previous to the sale, is designed to secure the attendance of purchasers of, and a fair price for, the mortgaged estate; and where such a notice was not signed by any one, and gave neither the name of the mortgagor, nor of the mortgagee, nor, correctly, a reference to the page of the volume of Land Records on which the mortgage was recorded, nor even the name of the auctioneer who was employed to sell the estate, it was held to be fatally defective, and, notwithstanding a sale under it, a redemption of the mortgaged estate was decreed to the assignee of the equity; such notice affording to persons who might desire to purchase the estate no means of ascertaining the validity of the title offered to them. *Hoffman v. Anthony & others*, 282.
4. A widow, made by her husband's will life tenant of his real estate, was also authorized by the will, in case she should require anything more than the profits of the estate for her comfortable support and maintenance, to sell so much of it, as should, in her judgment, be necessary for that purpose: and the remainder of said estate, if any, was to go to the son and certain grandchildren of the testator, in such manner and proportion as she, by her last will and testament might direct. She married again; and just before the marriage conveyed the homestead estate of her old husband to her new one, for the nominal consideration of twelve hundred dollars, "said sum," as she expressed it in her deed, "being necessary, in my judgment, for my comfortable support." The real consideration of the deed, however, was the contemplated marriage, and about one hundred dollars paid to her by her betrothed, the defendant, at the time the deed was executed, to enable her to settle a debt she was owing. *Held*, that this was a fraudulent execution by the widow of the power of sale intrusted to her; and that upon her death, intestate, those entitled to the estate in remainder under the will of her first husband might, in equity, compel her second husband, as their trustee, to convey the estate to them, according to their interest, upon condition of repaying to him the hundred dollars with interest, after deducting therefrom the rents and profits of the estate, received by him since the death of the life tenant, with all just allowances. *Hutchinson & others v. Cole*, 314.
5. Where a testator, by his will, gave to his wife "all his property, both real and personal, of which he was possessed at his decease, after paying all his just debts," and then gave her power to sell any part of his property for the payment of his debts and the support and education of his daughter until she arrived at the age of eighteen years, when the daughter was to have one half of his property, but in the event of her death before eighteen the wife was to have the whole, *held*, that the wife had an indefeasible title in fee to an undivided half of the real property of the testator, and by virtue of this in-

terest, and her power under the will to sell the other half, could give a good title in fee to any specific portion of the testator's real estate. *Carpenter v. Brown*, 383.

6. An auction sale of land under a power contained in a mortgage may be avoided, where, by a mistake in the advertisement, the sale is advertised to be made in one year, and was designed to be made and was actually made in the succeeding year; or where the tract of land as advertised, although by its description it includes the lot sold, contains double the area of the latter. *Fenner v. Tucker*, 551.

PROMISSORY NOTES AND BILLS OF EXCHANGE.

1. An agreement by the parties to promissory notes, made subsequently to the notes, that certain commissions, contemplated by the agreement to be earned by the maker of the notes in the business of the holders, should be applied to the payment of the notes, if sufficient, until the whole amount due upon them was paid; and if the whole amount was not thus paid at the maturity of the notes, that a renewal note should be received for the balance payable in two years, is no bar to an action upon the notes, within the two years, for the recovery of the amount due thereon. *Thurston, Gardner & Co. v. James*, 103.
2. The mere taking of security from the principal debtor upon promissory notes, by way of mortgage of his property, is no discharge of a surety upon the notes. *Ib.*
3. The payees of a note, who were New York stockbrokers, had received it from the defendant as collateral security for any balance which might accrue in their favor in the course of his stock transactions, carried on through them; and a large balance, far exceeding the amount of the note, had accrued in their favor growing out of stock transactions not proved to be impeachable under the New York statutes against stock-jobbing and gambling in stocks. In this state of things the plaintiff, who was an execution debtor of the defendant, and for the purpose of attaching thereon in the hands of the plaintiff's attorney the amount which he might pay on the execution, received the note indorsed in blank by the brokers, after it was overdue, under a contract to sue it in his own name, with the right to take to his own use, at the rate of fifty per cent., so much of the judgment he should recover as he might wish to use, — he paying the costs of collection on what he might take, — and to transfer the balance of the judgment to the brokers. *Held*, in a suit on the note, that the transfer of the note could not be objected to by the defendant as void for champerty; and that, although the note was subject in the hands of the plaintiff to all the defences that it would have been had it been sued by the brokers, as well from the character of the transfer as because transferred when overdue, yet that it was supported by the legal portion of their balance of account against the defendant exceeding its amount, although a portion of the balance grew out of stock transactions carried on by them for the defendant in which the sellers had not the stock to deliver; there being no proof that a general scheme was entered into between the brokers and the defendant to violate, in their transactions, the

laws of New York in regard to stock-jobbing and gambling, or that the brokers were cognizant of the objectionable portion of the defendant's stock transactions, that the sellers had not stock to deliver. *Thompson v. Ide*, 217.

4. Where no particular place for payment is named in a note, payment must be demanded of the maker, in order to charge the indorser, on the last day of grace, either personally, or at his place of business or abode; and written notice to the maker, by mail, given by a bank with whom the note is left for collection, and previous to the note's falling due, that the note has been so left, and of the day of payment, will not be a sufficient demand upon the maker to render the indorser liable. *Barnes v. Vaughan*, 259.
5. An agreement by the holders of a promissory note to release the indorser of it, upon condition of something to be done by the maker, cannot avail the indorser in defence to an action against him on the note, as a release by way of equitable estoppel, unless the condition, in the fair sense of the agreement, has been fully performed by the maker, although the non-performance of the condition is in no way chargeable upon the indorser. *Whatcheer Bank v. Cushing*, 303.
6. Where a bank holding an indorsed note, agreed with the maker and the indorser, that if the former, who had stopped payment, would prefer its claims against him, including the note, in the first class of his assignment with other banks, it would release the indorser, and the maker put the claims of the bank nominally in the first class of his assignment with other banks, but really postponed them in payment to debts exceeding in amount \$30,000, *Held*, in an action by the bank against the indorser, that the bank was not equitably estopped by the agreement from pursuing the indorser, inasmuch as the condition of the agreement had not been fairly performed by the maker, although without fault on the part of the indorser. *Id.*
7. He who indorses a note payable to another at the time it is made, is to the payee, a joint and several promisor with the maker; and as such, although but a surety as between himself and the maker, all promises and part payments made by the maker equally affect his liability under the statute of limitations, as if made by himself. *Perkins, Administrator, v. Barstow*, 505.
8. There is no legal intendment, under chapter 78 of the Revised Statutes, that domestic liquors, sold in large quantity, are illegally sold, so as to relieve a defendant, who attempts to impeach his own promissory note upon the ground that it was given to secure the price of liquors illegally sold, from the burden of satisfying the jury, by direct or circumstantial proof, that the plaintiffs were not manufacturers or distillers of liquors in this or some other state, or that the sale was not made for the purpose of exportation. *Craig & Co. v. Proctor*, 547.

PROSECUTOR.

Wife of, a witness, though the husband is bound for costs, unless the prosecution be maintained. *State v. Borden*, 495.

RAILROADS.

The fourth section of the "act in relation to railroads," (Dig. 1844, pp. 333, 339,) giving an action to any one injured by the neglect of a railroad company to ring the bell upon their locomotive engine for the distance, at least, of eighty rods from the place where the railroad crosses any turnpike, highway, or public way, upon the same level with the railroad, and to keep the same ringing until the engine shall have crossed such turnpike or road, was exclusively designed for the benefit of persons crossing the turnpike, highway, or public way on a level with the railroad; and hence, a person who is injured by the engine, whilst he is walking along the track of the railroad and not at any crossing, cannot recover damages against the railroad company for such injury, upon the ground that the injury was caused by their neglect to ring the bell upon their locomotive, as required by the statute. *O'Donnell v. The Providence & Worcester Railroad Co.* 216.

REFERENCE AND REFEREES.

1. An action of covenant cannot be maintained upon a sealed agreement to submit, under a rule of court, a pending action and all matters in dispute to certain referees, for the non-performance of their award, though the award be established by judgment, unless the agreement of submission contain some stipulation to perform it; the remedy in such case, if it be one that the execution of a common-law court, out of which the rule issues, will not afford, being a remedy in law or equity suited to the case. *Sprague v. Hull*, 27.
2. A party to a reference cannot object to the report, that he was surprised by a ground of defence taken at the hearing before the referees, and was unprepared to meet it by proof, if at the hearing he did not ask for delay, but by going on, notwithstanding his surprise, is deemed to have completely waived it. *Brown v. Steere, Executor*, 251.
3. A report of referees will not be set aside and a new trial before the referees ordered, on account of the discovery of new and further evidence which is cumulative only and not controlling in its character, especially when the effect will be to delay the settlement of the estate of a deceased person. *Ib.*
4. An avowal by a referee, after his appointment and before the hearing, of an opinion adverse to the claim submitted to him, is good cause not only to set aside his report, but to discharge the rule appointing him; the court requiring in referees the judicial attribute of impartiality, unless indeed the parties have agreed to waive it. *Ib.*

REGISTRY OF BIRTHS, MARRIAGES AND BURIALS.

See EVIDENCE, 8.

REMOVAL OF CAUSES INTO CIRCUIT COURT OF THE UNITED STATES.

1. Upon a petition for the removal of a cause from a state court to a court of the United States, the former has no discretion to refuse *one entitled* to the jurisdiction invoked, but a judicial discretion merely to decide and declare

whether the petitioner is thus entitled. *James & Wife v. Thurston, Gardiner & Co.* 428.

2. A party plaintiff, who although not indispensable to the maintenance of a bill in equity is nevertheless entitled upon the face of the bill to a decree; cannot, for the purpose of removal, be regarded as no party to the bill; the criterion of a mere nominal party, for such purpose, being, whether the party is entitled or subject to a decree; and therefore, where such a party was co-plaintiff with others, but not, like them, a citizen of the state in whose court the suit was brought, his presence was held fatal to a petition by the defendants for the removal of the cause into a circuit court of the United States, although, but for this objection, they would have been entitled to remove it. *Id.*
3. An assignee for the benefit of creditors, a citizen of the State of Rhode Island, filed a bill in equity in the state court, against a Massachusetts creditor of his assignor, who had obtained a state execution, and the officer charged with the service of the execution, who was a citizen of Rhode Island, to establish his trust, and to enjoin the sale of the trust property levied upon by the execution. Upon a petition by the execution creditor to remove the bill into the circuit court of the United States for the Rhode Island District, *Held*, that the officer was not a formal, official, or unnecessary party to the bill, so that his being a co-defendant could be disregarded by the court in considering whether the applicant was entitled to the jurisdiction which he invoked; and that the petition must be dismissed. *Nye v. Nightingale, Assignee*, 439.

REPORT OF REFEREES.

See REFERENCE AND REFEREES, 2, 3, 4.

RESCISSION OF SALE.

In trover by the vendor, for goods purchased on credit by the defendant by means of fraudulent misrepresentations of his own property and that of another by whose acceptances he secured payment for the goods, it is not necessary — the drafts being overdue and worthless from the insolvency of both parties to them at the time of action brought — to restore, or offer to restore, them to the defendant before the commencement of the action; but it is sufficient, if they are brought into court at the trial, to be impounded for the use of the defendant; and, in such case, cash and the note of a third person, originally, or before the discovery of the fraud, received by the vendor in part payment for the goods, need not be restored to the defendant at all, to enable the vendor to maintain such action against him for the balance of the goods included in the purchase, out of which he had been defrauded. *Duval & Iglehart v. Mowry*, 479.

SALE UPON EXECUTION, ADJOURNMENT OF.

See EXECUTION, 1, 2.

SALE, RESCISSION OF.

See RESCISSION OF SALE, 1.

SCHOOL COMMISSIONER.

1. Trespass is the proper form of action to be brought against the trustees of a school district, by one, against whom they have illegally assessed and ordered to be collected a school tax. *Crandall v. James & others*, 144.
2. Upon the trial of such an action, the decision of the school commissioner and a justice of the supreme court, upon appeal, under ch. 68, sects. 1 and 2, that a tax has been illegally assessed, is conclusive, both in law and fact, upon the parties to the appeal, as to that question; and this construction of the statute does not bring it into conflict with sect. 15, art. 1, of the constitution, which declares, that "the right of trial by jury shall remain inviolate." *Id.*

SCHOOL DISTRICT (WHO A VOTER IN).

Any resident of a school district, qualified at the time, as a registered voter, to vote in town meeting, is entitled to vote in the district meeting to assess a tax for the repair or improvement of the district school-house, provided he be liable, on account of his personal estate to contribute to the tax for which he votes, although he has never been assessed for such personal estate, and his name is not upon the last list of town voters. *Appeal of Sylvester R. Pearce & others*, Appendix, 589.

See **SCHOOL COMMISSIONER**, 1, 2.

SCHOOL-HOUSE.

The trustees of a school district may, subject to the control of the district meeting, lawfully permit the district school-house to be used, out of school hours, for the purpose of private instruction in vocal music of the district scholars and of others residing in the district; and it is no objection to such use that the teacher is compensated by private subscription or otherwise. *Appeal of John W. Barnes*, Appendix, 591.

SETTLEMENT.

A wife follows the settlement of her husband, whether it be in this state or in any of the United States, and thereby loses her former settlement in a town of this state; and if she afterwards return to this state, cannot, by virtue of ch. 51, sect. 13, of the Revised Statutes be removed, as a pauper, to the town of her former settlement in this state,—that not being the town to which she belongs, or in which she was last legally settled. *Exeter v. Richmond*, 149.

SHELLEY'S CASE (RULE IN).

See **WILLS**, 4.

SHERIFF (POWER TO ADJOURN SALE UPON EXECUTION).

See **EXECUTION**, 1, 2.

SIDEWALKS.

A notice given by the street commissioners of the city of Providence to the owner of two estates on the same street, that he must, before a time specified

in the notice, alter and improve the sidewalk adjoining his *estate*, situated on the street, without specifying which estate, is bad for uncertainty; nor is it well served, under the statute "concerning sidewalks in the town of Providence," if the owner be a resident of the city, by being left, during his temporary absence, at his boarding-house, the statute in such case requiring personal service; and the neglect of the owner to improve the sidewalk adjoining that one of his estates intended by the commissioners, upon such notice, will not justify the city in assessing against, and exacting from the owner, the expenses paid by the city surveyor in making the improvement. *Simmons v. Gardiner, City Treasurer*, 255.

SUBMISSION.

See REFERENCE AND REFEREES.

TAXES.

1. The interest of a religious society in lands leased by them, and upon which they have erected a building, partly occupied by them for religious worship and partly rented for stores and other purposes, — the rents and profits being appropriated exclusively to religious uses, — is exempted from general taxation by sect. 2, ch. 87, of the Rev. Stats.; but not from an assessment made upon it for benefits derived from the laying out of a new street, in the vicinity, under the act of January, 1854, entitled "An Act in relation to the laying out, enlarging, straightening, and otherwise altering streets in the city of Providence." *Second Universalist Society in Providence v. The City of Providence*, 235.
2. Where a religious society held lands under leases which covenanted that the society should pay all taxes assessed upon the demised premises, and, at the request of the treasurer of the society, the lands, for their interest in which the lessors had before been taxed, were, for the convenience of the society in paying such tax, assessed solely to the society, *Held*, upon an action brought by the society to recover back such tax as illegally assessed, — the same having been paid under protest, — that the society were equitably estopped from objecting to the change of assessment. *Ib.*
3. Where a lessee voluntarily pays a city street-assessment, duly made against the lessors for their reversionary interest in the demised premises, it cannot be recovered back from the city, although there was no obligation upon the lessee to pay it under the covenants of the lease. *Ib.*
4. R. W. G., who had a double residence in the towns of W. and P., was, in December, 1856, taxed for personal property in the town of W. where he had been a tax-payer and voter for several years. On the 31st day of March, 1857, a tax-act went into operation, which provided, that persons should be taxable for their personal estate in the towns in which they had their actual abode for the greater portion of the twelve months next preceding the first day of April in each year. *Held*, that R. W. G. having had his actual abode in the town of P. for more than six months next before the first day of April, 1857, was, in the September of that year, taxable for his personal property,

- in the town of P.; and that the tax act was not made to retroact, by taking into account R. W. G.'s place of actual abode prior to its going into operation, in order to ascertain his place of taxation under it, after it went into operation. *Greene v. Gardiner, City Treasurer*, 242.
5. The time of redemption of a tax title, accrued under the act contained in the Digest of 1844, is not enlarged from six months to one year by the act of March 13, 1855, contained in the Revised Statutes of 1857; the proviso in the repealing clause in the latter act expressly saving all rights vested under the former act. *McCulloch v. Dodge & another*, 346.
 6. Where the time of redemption is past, if the owner of an estate sold for taxes would avail himself of a waiver of the tax title, made on condition that he would on a day certain exhibit proof of his ownership and former right to redeem, he must comply with the condition before he can avail himself of the waiver. *Ib.*
 7. Upon a mere bill to redeem a tax title upon the ground that the tender required by the statute had been made within the legal time of redemption, the complainant can have no relief upon the grounds, that no tax was assessed, or that the tax was illegally assessed, or that the person who acted as collector of taxes was not collector, or that the sale was void, or the deed void, although the bill speaks of the sale as made by a person who *assumed* to be collector, and of the assessment and sale and deed as *pretended*; the bill not seeking relief upon these latter grounds, and containing no specific allegations fitted to them. *Ib.*
 8. A Massachusetts manufacturing corporation, which has hired by lease parcel print works in this state, is not taxable in the town where the works are situated for its cotton cloth there in process of being printed and prepared for market; such cloth not being "merchandise" or "stock in trade" in the sense of section 13, chapter 38 of the Revised Statutes. *Woodman, Collector, v. The American Print Works*, 470.

See SIDEWALKS, 1.

TENANTS IN COMMON.

See EVIDENCE, 5.

TENDER.

See COSTS, 1; RESCISSION OF SALE, 1.

TRADE-MARK.

The name of "Roger Williams Long Cloth" is capable of being appropriated by a manufacturer to cotton cloth of his manufacture, to distinguish it from cloth of the same general description manufactured by others; and if, to the knowledge of the public, it be so appropriated by the plaintiff, a person who stamps the name of "Roger Williams" on his cloth of similar description, with the design and effect of fraudulently passing it upon the market as and for cloth manufactured by the plaintiff, to the lessening of the gains and credit as a manufacturer of the latter, is liable to him for the injury caused thereby. *Barrows v. Knight*, 484.

TRESPASS, ACTION OF.

1. Trespass is the proper form of action to be brought against the trustees of a school district, by one, against whom they have illegally assessed and ordered to be collected a school tax. *Crandall v. James & others*, 144.
2. Upon the trial of such an action, the decision of the school commissioner and a justice of the supreme court, upon appeal, under ch. 68, sects. 1 and 2, that a tax has been illegally assessed, is conclusive, both in law and fact, upon the parties to the appeal, as to that question; and this construction of the statute does not bring it into conflict with sect. 15, art. 1, of the constitution, which declares, that "the right of trial by jury shall remain inviolate." *Ib.*

TRESPASS AND EJECTMENT.

1. A defendant in trespass and ejectment cannot, at least under ordinary pleas to the maintenance of the action, protect his possession by setting up an outstanding mortgage of the ancestor of the plaintiff purchased in by the defendant pending the action; nor by setting up such a mortgage discharged of record before the commencement of the action, but assigned to him pending the action; although he proves that the mortgage was purchased by him before the action and discharged by mistake of the mortgagee, and the assignment recites the purchase and mistake. *Fitzpatrick & others v. Fitzpatrick & others*, 64.
2. Where the title produced by a plaintiff in an action of trespass and ejectment is fatally defective for a cause not noticed or objected by the defendant at the trial, the court may, nevertheless, grant to the defendant a new trial, on the ground of such defect, provided it is apparent that the defect, if objected at the trial, could not have been remedied by further proof on the part of the plaintiff. *Ib.*
3. In ejectment to recover possession of lands mortgaged to the plaintiff, it appearing by the defendants' plea, that the mortgage was given to secure the payment of a promissory note the principal sum of which was payable at the end of four years, but the interest annually, it was held, that the condition of the mortgage was broken by the non-payment of the annual interest for three years, although the principal sum was not due; and that conditional judgment for possession must be entered up for the plaintiff, in conformity to sect. 7, ch. 189, of the Revised Statutes. *Carpenter v. Carpenter & others*, 542.

TROVER.

1. In trover against two for a joint conversion, the plaintiffs obtained judgment by default against one, and then withdrew their action against the other, upon receiving from him partial satisfaction for the wrong, and agreeing no further to prosecute him personally therefor. Held, that damages might be assessed against the defaulted defendant for the value of the goods converted, with interest from the time of conversion, deducting therefrom the amount received from his codefendant, by way of compromise, for his liability. *Heyer, Brothers, v. Carr & another*, 45.

See RESCISSION OF SALE, 1.

TRUSTEE AND TRUSTEES.

1. The necessary repairs of the buildings upon the farm are a charge upon the estate of the life tenant, during its continuance; and the trustee of the life tenant is justified in applying, from time to time, such portion of the rent as may be necessary to make such repairs. The trustee has, however, no power to sell the interest of the life tenant in any portion of the farm, to make such repairs, nor will a court of equity authorize him to do so; the life tenant being *sui juris*, and there being no restraint upon his alienation of his estate. *Thurston v. Thurston & others*, 296.
2. A court of equity has no jurisdiction, in such case, upon the application of the trustee of the life tenant to authorize him to sell for such repairs the interest of the minor children of the life tenant, in any portion of the farm; the trust not extending to their estate, and the modern doctrine being, even in case of a trust for an infant, that where no duty or charge is incumbent upon the inheritance of an infant, the court has no power to authorize it to be sold by the trustee merely upon the ground of some benefit which may accrue to the infant therefrom. *Ib.*
3. Where a testator, after giving a life-estate to his wife in his real and personal estate, gave a remainder in the same to trustees, in the event his wife died before the youngest of his three children became twenty-five years of age, to hold the same until his youngest child attained that age, and ordered the trustees to distribute the net income of the same amongst his children, "and if either shall have deceased without leaving children then living, to pay the same to the surviving children in equal shares; and if either shall have deceased leaving a child or children, such child or children to have the portion of the income which his or her parents would have taken," and gave a fee in the remainder, without trust, to his sons, and in trust, for her sole and separate use, to his daughter, only in the event his wife died after his youngest child had attained the age of twenty-five years, *Held*, the wife having died before the youngest child attained the age of twenty-five years, and the youngest of the two surviving children having attained that age when the trustees filed their bill for instructions and partition, — that the trustees should quit-claim their title to the property to the two surviving children of the testator, free from trust as those to whom the same reverted, as his next of kin and heirs at law, and could have no partition. *Gardiner & others, Trustees, v. Willard & others*, 508.

See ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

TRUSTEES OF SCHOOL DISTRICT.

See SCHOOL COMMISSIONER, 1, 2; SCHOOL HOUSE, 1.

TURNPIKE COMPANY.

The toll-rate clause in the charter of a turnpike company provided, that for each passage over the company's road, which was a post-road, "a coach, chariot, or phaeton" should pay a toll of thirty-three cents, but a "mail-stage" only

six cents. *Held*, that in the sense of the charter, and for the purpose of ascertaining the rate of toll, a coach was a "mail stage" which actually carried the public mail over the road under a temporary arrangement, fairly made with the post-office department, through a deputy postmaster, for the public convenience, and not for the mere purpose of evading the higher rate of toll; and that it was not competent for the company to insist, that the contract was not in writing, or did not in the manner of making it conform to the directions of the acts of congress with regard to regular mail contracts, for the purpose of exacting the higher rate of toll. *Rhode Island & Connecticut Turnpike Society v. Harris & others*, 224.

VENDOR AND VENDEE.

See RESCISSION OF SALE, 1.

VOLUNTARY PAYMENT.

See TAXES, 3.

WILLS.

1. A father, having devised certain real estate to S. C., one of his sons, "subject to the restrictions and incumbrances hereinafter pointed out and explained," in a subsequent clause of his will declared: "My mind and will is, and I hereby declare the same, that provided my daughter A. C. shall, at any time hereafter, choose to live in the family of my son S. C. she shall have the right so to live; and the estate herein given to my said son S. C. shall be subject to that incumbrance during her life, or so long as she shall remain single or unmarried." *Held*, that A. C. had a permanent right to a support out of the estate devised to S. C. not dependent upon the life of S. C., or the keeping together of his family; the living in the family being designed to signify rather the kind of support to which A. C. was entitled, than its duration, which was expressly declared to be for her life, or so long as she should remain unmarried; and that the court would enforce this charge against the real estate so devised, in the hands of the heirs of S. C. and purchasers and devisees of purchasers of the same from him. *Clapp v. Clapp & others*, 129.
2. A bequest of money to a married woman, charged by the will upon lands of the husband mortgaged to the testator, by the terms of which bequest the interest of the sum is to go to her during her life, and the property to her children, at her decease, does not entitle her to receive the principal sum; but the same should, no trustee being named in the will, be retained by the executrix to enable her to carry out the directions of the testator. *Clarke & Wife v. Burdick, Executrix*, 151.
3. A devise of lands to "my grandson, Stephen Cooper (son of Stephen), my aforementioned grandson to come into possession at twenty-one years of age, and to have and to hold the abovenamed bequest to him during his natural life; and after his decease, I give the premises unto his male heirs, equally between them; and, for want of heirs male, then to go in equal shares to his daughters," vests an estate tail in Stephen, the grandson, under the rule in Shelley's case; the clause of the statute of wills in relation to the creation and continu-

ance of estates tail, not being applicable to such a case. *Cooper & others v. Cooper*, 261.

4. A devise of a farm to B. B. T. "in special trust and confidence for my son H. T., and after him, in fee to his heirs," with an order to the trustee to pay to H. T. the annual rent of the farm, "and in the event of his decease without issue," the farm to "revert equally to all the other surviving children of the testatrix," gives to H. T. an *equitable* estate for life, and to his heirs of the body a *legal* remainder in fee; the rule in Shelley's case not applying on account of the different qualities of the two estates. *Thurston v. Thurston & others*, 296.
5. Where a testator, by his will, gave to his wife "all his property, both real and personal, of which he was possessed at his decease, after paying all his just debts," and then gave her power to sell any part of his property for the payment of his debts and the support and education of his daughter until she arrived at the age of eighteen years, when the daughter was to have one half his property, but in the event of her death before eighteen the wife was to have the whole, *Held*, that the wife had an indefeasible title in fee to an undivided half of the real property of the testator, and by virtue of this interest, and her power under the will to sell the other half, could give a good title in fee to any specific portion of the testator's real estate. *Carpenter v. Brown*, 383.
6. The statute claim of a child, born after the execution of his father's or mother's will, for whom no provision is made therein, to the same right and interest in the estate of his father or mother as if the father or mother had died intestate, cannot be resisted by proof, that the omission to provide for him was intentional; and hence, on the trial of an action of ejectment, in which the plaintiffs claimed against the will of the parent in right of the after-born child, parol evidence to this effect was held inadmissible. *Chace & others v. Chace & others*, 407.
7. A testator devised to his two sons, W. L. C. and C. S. C., his Baker Farm and Morse Lot, "during the term of their natural lives, equally between them, and then to their children lawfully begotten, as follows, to wit: The one half of said real estate to the child or children of the said W. L. C. or their descendants, if any such there be, and to their heirs and assigns forever, and the other half to the child or children of the said C. S. C. or their descendants, if any such there be, and to their heirs and assigns forever; provided, however, that in case that either of my said sons, W. L. C. and C. S. C. shall die leaving no child or children or their descendants to take and hold as lawful heirs, the portion of said estate herein given to such deceased son, then the same shall go to the child or children lawfully begotten of the other of my last-named sons or their descendants, if any such there be, and to their heirs and assigns forever; but in case of the failure of said estate vesting in the legal descendants of the said W. L. C. and C. S. C. in manner as aforesaid, then, and in such case, I give and devise said real estate to my said daughter H. M. C., as follows, viz.: to take and hold the one half of said estate upon the death of the first of my said sons, W. and C., and the other half of said estate, upon the death of the other of my said sons, which shall be and remain to her my said daughter H., and to her heirs and assigns forever, pro-

vided that she dies leaving lineal heirs of her body; but, in case the said H. M. shall die leaving no child or children or their descendants to take and hold said real estate as lawful heirs, then, and in that case, I give and devise said real estate to my son, T. O. H. C., Jr., and to my daughter F. H. H., equally between them, and to their heirs, and assigns forever." *Held*, upon the death of the testator's son, C. S. C., leaving no descendants,—the testator's son W. L. C. then living, but having no descendants,—that the half of the real estate devised to C. S. C. passed to the testator's daughter, H. M. C., so as to constitute her, the same being undivided, a tenant in common with W. L. C., or of his alienee of the same. *Wells & Wife v. Fairbanks*, 474.

8. Where a testator, after giving a life-estate to his wife in his real and personal estate, gave a remainder in the same to trustees, in the event his wife died before the youngest of his three children became twenty-five years of age, to hold the same until his youngest child attained that age, and ordered the trustees to distribute the net income of the same amongst his children, "and if either shall have deceased without leaving children then living, to pay the same to the surviving children in equal shares; and if either shall have deceased leaving a child or children, such child or children to have the portion of the income which his or her parents would have taken," and gave a fee in the remainder, without trust, to his sons, and in trust, for her sole and separate use, to his daughter, only in the event his wife died after his youngest child had attained the age of twenty-five years, *Held*, the wife having died before the youngest child attained the age of twenty-five years, and the youngest of the two surviving children having attained that age when the trustees filed their bill for instructions and partition,—that the trustees should quitclaim their title to the property to the two surviving children of the testator, free from trust as those to whom the same reverted as his next of kin and heirs at law, and could have no partition. *Gardiner & others, Trustees, v. Willard & others*, 508.

9. A testatrix made to her grandchildren several specific devises "to their heirs and assigns forever;" and in the eighth clause of her will proceeded:—

"Eighthly. I give and devise all the remainder of my real estate unto all my grandchildren, in equal shares, and to their heirs and assigns forever. And it is hereby provided, and my will is, that if any of my grandchildren should die, leaving no surviving issue, then I give and devise all the estate, both real and personal herein given to such grandchild, unto the survivor or survivors of such as shall die as aforesaid, and to their heirs and assigns forever; provided that none of my grandsons shall, in any event, have any of my personal estate, other than the specific legacies herein bequeathed unto them, as long as any of my granddaughters, or any of their issue be living. It is also further provided, and my will is, that if all my grandchildren should die, leaving no surviving issue, then I give and devise all my estate unto two of the daughters of my uncle Thomas Field, to wit: Mary and Sally, and unto two of my said uncle's granddaughters, to wit: Mary and Elizabeth Thornton, and to their heirs and assigns forever." *Held*, that the grandchildren of the testatrix took estates-tail in her real estate, and not fee-simples conditional upon their dying without issue. *Burrough & Wife v. Foster*, 534.

10. Where an indefinite estate in land is given by a will, the imposition of the payment of a legacy upon the devisee, or of an annual charge upon him, or upon his estate, for a term which may endure longer than his life, will enlarge his estate into a fee, without regard to the disparity between the amount of the legacy or charge and the annual value of the land. *King v. Cole & another*, 584.
11. When a testator gives indefinitely a home in the homestead with sufficient firewood fit for use to such of his daughters as shall remain unmarried at the death of their mother, who is also provided for by his will out of the homestead farm, the court will not supply words limiting their right to the period that they shall remain unmarried; there being nothing more to show that the testator intended to use words thus limiting it. *Ib.*

See CONTRACT, 6; POWERS, 4.

WITNESS.

See EVIDENCE, 10.

Ex. h. d. a.

